(27,291)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 536.

STARK BROS. NURSERIES AND ORCHARDS COMPANY, PETITIONER,

vs.

WILLIAM P. STARK AND WILLIAM H. STARK, TRUSTEES, DOING BUSINESS UNDER THE NAME AND STYLE OF WILLIAM P. STARK NURSERIES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a *Original.*

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Eighth Circuit.

No. 5181.

WILLIAM P. STARK and WILLIAM H. STARK, Trustees, Doing Business under Name and Style of William P. Stark, Nurseries, Appellants,

vs.

STARK BROS. NURSERIES & ORCHARDS COMPANY, Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

Filed Jun- 11, 1918. E. E. Koch, Clerk.

b Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1918, of Said Court, Before the Honorable Walter H. Sanborn and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable Jacob Trieber, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the eleventh day of June, A. D. 1918, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, wherein William P. Stark and William H. Stark, Trustees doing business under the name and style of William P. Stark Nurseries, were Appellants, and the Stark Brothers Nurseries and Orchards Company was Appellee, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of an *Act* of Congress approved February 13, 1911, is in the words and figures following, to wit:

(*Citation.*)

The President of the United States to Stark Brothers Nurseries & Orchards Company:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Judicial Circuit, in the City of St. Louis, State of Missouri, within sixty days from and after the day this citation bears date, pursuant to an appeal from a decree of the District Court for the Southwestern Division of the Western District of Missouri, filed in the clerk's office of the District Court of the United States for the Southwestern Division of the Western District of Missouri; wherein William P. Stark and William H. Stark, trustees, doing business under the name and style of William P. Stark Nurseries, are appellant-, and you are appellee, to show cause, if any there be, why said decree mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arba S. Van Valkenburgh, Judge of the United States District Court, this the 26th day of March, A. D., 1918.

ARBA S. VAN VALKENBURGH,
Judge.

Filed in the District Court of the United States March 26, 1918.

1 UNITED STATES OF AMERICA, *set:*

Be it remembered, that heretofore, to-wit, at the regular June term of the District Court of the United States for the Southwestern Division of the Western District of Missouri, and on the 11th day of September, 1916, a bill of complaint was filed in the office of the clerk of the District Court of the United States for the Southwestern Division of the Western District of Missouri in the case wherein Stark Bros. Nurseries & Orchards Company, is plaintiff and William P. Stark and William H. Stark, trustees, doing business under name and style of William P. Stark, Nurseries, are defendants.

(*Bill of Complaint.*)

In Equity. No. —.

STARK BROS. NURSERIES & ORCHARDS COMPANY, Plaintiff,

vs.

WILLIAM P. STARK and WILLIAM H. STARK, Trustees, Doing Business under Name and Style of William P. Stark Nurseries, Defendants.

Bill of Complaint.

To the Honorable the Judges of the Southwestern Division of the Western Judicial District of Missouri, in Equity:

Plaintiff, for its bill of complaint, alleges:

First. That it is a corporation duly organized and existing under the laws of the State of Missouri, and a citizen of said State and of the United States, and has its principal place of business at Louisiana, Pike County, Missouri; and on information and belief that the above named defendants, William P. Stark and William H. Stark, trustees, doing business under the name and style of William P. Stark Nurseries, at Neosho, Newton County, Missouri, and in the Southwestern Division of the Western District of Missouri, are citizens of the State of Missouri and of the United States, and are each residents of Neosho, Newton County, Missouri, and of said Southwestern Division of the Western District of Missouri.

Second. That plaintiff now is, and has since the year 1816, including its predecessors, James Stark, William Stark, Stark & Barnett, Stark & Company and Stark Bros. Nurseries Company, been engaged in the business of propagating, buying and selling fruit trees and other nursery stock at wholesale and retail, and began in the year 1893 to sell superior fruit trees, which it marked with the words "Stark Trees" as its trade-mark. That plaintiff has long prior to the year 1895 affixed this, its trade-mark, "Stark Trees," and does now affix it, to boxes or packages containing its product, by means of a label on which said mark is printed. One of the plaintiff's labels is annexed hereunto and made a part of this bill as Exhibit "A."

2 Third. That plaintiff has incurred great expenses in propagating trees and bringing before the public by advertising and by other means this brand of fruit trees marked "Stark Trees," and that its said trade-mark has become widely known in this and many foreign countries as indicating a superior grade of trees propagated and sold by plaintiff. That since the year 1893 plaintiff has propagated and sold large amounts of said fruit trees marked with the words "Stark Trees" as a trade-mark. That plaintiff's fruit trees marked "Stark Trees" are invariably bought and sold, and commonly designated as "Stark Trees."

Fourth. That plaintiff has, since 1893, and is now using its trade-mark "Stark Trees" on fruit trees and other nursery stock extensively in interstate commerce and in commerce with foreign nations.

Fifth. That, on January 9, 1913, plaintiff duly filed in the United States Patent Office an application for registration of its said trade-mark "Stark Trees" for "fruit trees, fruit plants and hardy ornamentals," in accordance with the Act of Congress of February 20, 1905, and acts amendatory and supplemental thereto, and that, thereafter, all requirements of the statutes then in force having been complied with, said trade-mark was duly registered in the United States Patent Office on June 24, 1913, as registration No. 92,282, a printed copy of the certificate of registration No. 92282, is hereunto attached and made part of this bill as Exhibit "B."

Sixth. That the sole and exclusive right to the trade-mark "Stark Trees" or the word "Stark" on fruit and ornamental trees has always

been and now is claimed by plaintiff and predecessors; that plaintiff was the first to adopt and use this mark for nursery stock; that plaintiff has always notified the public of the exclusive right claimed to use this mark as a trade-mark for fruit trees, in the manner required by law, and has notified the defendants herein personally in writing; that plaintiff's right to the sole and exclusive use of this trade-mark has been universally acquiesced in, except as herein complained of; and that plaintiff has never licensed the defendants herein, nor any of them, nor any one else, to use the trade-mark "Stark Trees," "Stark," or any simulation thereof, for nursery stock of any description.

Seventh. That the value of plaintiff's trade-mark is greatly in excess of three thousand dollars ($3,000.00), exclusive of interest and costs.

Eighth. That about the latter part of the spring of 1913, plaintiff found that sales of fruit trees, labeled and marked with the words "William P. Stark Nurseries" (said words being printed across the representation of a short, bushy tree, so arranged that the word "Stark" appeared in large, prominent letters directly across the picture of the tree, while the words "William P." and "Nurseries" were in comparatively small type), had been made in Missouri, Illinois and a number of other states, and, upon investigation, found that these fruit trees were marked and sold by the defendants
3 herein, all in infringement of plaintiff's said registered trade-mark, and of its trade-mark rights under the law. One of the labels as used by defendants is hereunto annexed and made part of this bill as Exhibit "C."

Ninth. That the said defendants well knew of the exclusive use claimed by plaintiff of the trade-mark "Stark Trees," or any simulation thereof, for nursery stock, and of plaintiff's long, quiet enjoyment thereof; that with the intent to defraud and deceive, the said defendants have used and extensively advertised the trade-mark "Stark" in conjunction with the representation of a tree, for nursery stock, and that such use of said mark is calculated to cause and has caused the nursery stock of said defendants to be bought as and for the nursery stock of the plaintiff, much to plaintiff's loss, the injury to the public, and in infringement of plaintiff's registered trade-mark, and of its trade-mark rights under the law; and that the defendants have profited and that the plaintiff has been damaged by said infringement.

Tenth. That defendants have been duly notified of their infringement of plaintiff's trade-mark rights, and rights under the law, but nevertheless defendants have continued to infringe since such notice.

Eleventh. Plaintiff further states on information and belief:

That William P. Stark, one of the defendants herein, was an employe, officer and stockholder—holding about three-tenths of the capital stock—of the Stark Bros. Nurseries and Orchards Company

(hereinafter referred to as the Stark Company) for a number of years, during which time he attempted to and did familiarize his personal name to readers of the Stark Company's general advertising, which reached millions of readers, while in Stark Company's "Planting Book" in the year 1911, the name William Stark appeared about sixteen times with no mention of the Stark Company, and in this book William H. Stark caused testimonial letters written to the Stark Company to read "William Stark."

That in November, 1911, William H. Stark, one of the defendants herein, son of William P. Stark, while still on the payroll of the Stark Company, at the direction of his father, William P. Stark, spent much of his time for several months in looking for a location for a new nursery which William P. Stark was contemplating starting to compete with his employer, the Stark Company, and in April, 1912, William H. Stark resigned under pressure from the Stark Company.

That on June 1, 1912, while William P. Stark was still an employe and officer of the Stark Company, the William Stark Nurseries, financially backed by William P. Stark, were announced to the trade, with the principal offices at Louisiana, Missouri, the home of the Stark Company and predecessors for almost a hundred years, and that William P. Stark remained with the Stark Company and secured information that was of benefit to the rival nursery he was backing, which actions caused the Stark Company not to re-
4 elect William P. Stark as an official of the Stark Company.

That after the William Stark Nurseries were launched at Louisiana, Missouri, the home of the Stark Company and its predecessors for nearly a century, the mail matter of the two nurseries was confused to the point of the Stark Company making formal complaint to the Postal Department, which department, after investigation, issued an order to the effect that all mail matter addressed in any manner to a nursery referring to the name "Stark" at Louisiana, Missouri, was to be delivered to the Stark Company first; whereupon the William Stark Nurseries moved their offices to Chester, Missouri, and changed the style of their firm name to "William P. Stark Nurseries."

That a few weeks later, at the instigation of William P. Stark, the name of the town Chester was changed to Stark City, in face of the fact that for years prior the Stark Company featured in extensive national advertising the addresses "Stark," Missouri, "Starkdale," Missouri, and "Stark Station," Missouri.

That about the time that Chester was changed to Stark City, the William P. Stark Nurseries moved their offices to Neosho, Missouri, about ten miles from Stark City, and since that time all of William P. Stark Nurseries' advertising prominently bore the address, Stark City, and the use of this address has caused much annoying and damaging confusion to the Stark Company.

That the William P. Stark Nurseries, in advertising covering the whole country, featured the picture of William P. Stark along with the statement, "William P. Stark's many friends, who have been in

touch with him for thirty years, will please write for the 1915 book * * *"; and that the William P. Stark Nurseries published in their catalogs of the years 1913, 1914 and 1915, and in periodicals of international circulation, the statement. "The name of Stark has for nearly a century been associated with the nursery business of America, and for the last quarter of a century William P. Stark has made the name a sort of trade-mark for big things in nursery work, and now, with William P. Stark's great name and life-long experience to direct affairs, and William H. to execute, the William P. Stark Nurseries are in better position than ever to continue and broaden the Stark Nursery business in Missouri at their Stark City plant," which misleading statement was published before William P. Stark Nurseries had been selling trees a single year.

That in face of the fact that during his twenty-five years connection with the old Stark Company, William P. Stark featured and familiarized his name to millions of readers of the Stark Company's numerous advertisements, the Stark Company suffered much vexations and injurious confusion when the William P. Stark Nurseries featured the name Stark extensively in big advertising campaigns.

That the Stark Company has built up at great labor and expense an organization of about five thousand resident salesmen, commonly known by the public as "tree agents," who designate their wares as plaintiff's trade-marked "Stark Trees," and that William P. Stark Nurseries advertised broadcast, "Don't be misled by fakers claiming to be our agents," and they circulated in form letters the statement, "We have heard of a man in your vicinity who claims to be our agent or salesman. He is a fake"; and that this sort of advertising caused the Stark Company to lose not only many old customers, but a number of agents who believed that the Stark Company maintained a secret mail-order branch at Stark City, to the detriment of the salesmen.

That the above enumerated deliberate acts were done by defendants with the intention of gaining advantage of plaintiff's reputation in the trade-mark "Stark Trees" and the name "Stark."

Plaintiff, therefore, prays:

(1) That writs of subpœna issue, directed to each and every one of the defendants, commanding them to appear herein and answer, but not under oath (answer under oath being expressly waived), the allegations contained in the foregoing bill, and to abide by and perform such order or decree as the court may make in the premises.

(2) For a permanent injunction, and for a preliminary injunction pending this suit, restraining the defendants, their officers and workmen, from infringing plaintiff's trade-mark and trade-marks' rights.

(3) For an accounting of profits and damages, and that damages may be tripled, and for costs.

(4) That the court order a decree that William P. Stark Nurseries be dissolved.

(5) For such further relief as the circumstances of the case may require and the court may deem proper in the premises.

STARK BROS. NURSERIES & ORCHARDS COMPANY,
By E. W. STARK,
Its President.

ANDREW B. REMICK,
(St. Louis, Mo.),
JOHN W. MATSON,
(Louisiana, Mo.),
Solicitors for Plaintiff.

MERCER ARNOLD,
(Joplin, Mo.),
Of Counsel.

UNITED STATES OF AMERICA,
State of Missouri,
County of Pike, ss:

On the 8th day of September, 1916, before me came the above named Edgar W. Stark, the president of the Stark Bros. Nurseries & Orchards Company, and he being by me duly sworn, did depose and say that he has read the foregoing bill, and that the same is true of his knowledge, except as to matters therein stated on
6 information and belief, and that as to those matters he believes it to be true.

Sworn and subscribed to before me this 8th day of September, 1916. My commission expires July 29, 1920.

HENRY J. ARMSTRONG,
[SEAL.] *Notary Public.*

Filed in the District Court of the United States September 11, 1916.

(*Answer*)

Come now defendants and for answer to so much of plaintiff's petition as they are advised is material and necessary to answer, say:

I.

They admit that plaintiff is a corporation duly organized and existing under the laws of the State of Missouri, with its principal place of business at Louisiana, Missouri; and that defendants are engaged in business under the name and style of William P. Stark Nurseries at Neosho, Missouri; that both of the said defendants are residents of the State of Missouri.

II.

Further answering, and by way of demurrer, defendants say that the bill of complaint filed herein does not state facts sufficient to

constitute a cause of action against these defendants for infringement of the trademark of complainant, and it appears from the face of the bill and exhibits attached thereto that defendants have not infringed upon complainant's trademark rights, and defendants pray that the bill be dismissed for want of equity.

III.

Further answering, defendants say that this court has no jurisdiction to try the issue of unfair competition sought to be raised by complainants, it appearing from the face of the bill that there is no diversity of citizenship or other ground of federal jurisdiction, and defendants pray that the bill be dismissed for want of jurisdiction.

IV.

Further answering, defendants admit that plaintiff succeeded to the business of various companies and individuals which was founded in 1816, and that the name of "Stark" has been used in connection with the name of said business for many years, but defendants deny that plaintiff has since 1893 marked its fruit trees with the words "Stark Trees" as a trademark, and deny that plaintiff long before 1895 affixed a trademark "Stark Trees" or does not affix it to boxes or packages containing its products.

V.

Defendants further deny that complainant has advertised the brand of fruit trees known as "Stark Trees" or that such trade-
7 mark has become widely known as indicating a superior brand of trees propagated and sold by plaintiff; that since 1893 plaintiff has propagated and sold large amount of trees marked with "Stark Trees" as plaintiff's trees; or that plaintiff's trees are invariably bought and sold and commonly designated as "Stark Trees."

VI.

Defendants further deny that plaintiff has since 1893 and is now using as its trademark the mere words "Stark Trees" on the fruit trees and other nursery stock extensively in interstate commerce and commerce with foreign nations.

VII.

Further answering, defendants state that they have no information as to whether plaintiff filed an application in the Patent Office on January 9th, 1913, for registration of a trademark "Stark Trees" in such design as appears from Complainant's Exhibit "A," for fruit trees, plants and hardy ornamentals, or that they have complied with all the requirements of the statute and have registered the said trademark, and therefore defendants call for strict proof

as to the application for registration, and the registration of the said trademark and the form thereof.

VIII.

Further answering, defendants deny that the sole and exclusive right to the trade-mark of the words "Stark Trees" or the word "Stark" on fruit and ornamental trees has always been and now is claimed by plaintiff and its predecessors, or that plaintiff was the first to adopt and use this trade mark for nursery stock, or that plaintiff has always notified the public of the exclusive right or claim to use these words as a trade-mark for fruit trees; and deny that complainant has notified defendants personally in writing of such claim, except a notice dated on the — day of ——, 1916, long after defendants established their business and after they had been for several years using the name "Stark" in connection with their business; and defendants further deny that plaintiff's right to the sole and exclusive use of the term "Stark Trees" or "Stark" has been universally acquiesced in, but defendants allege and charge the fact to be that defendants were using the name "Stark" in connection with the growth and sale of nursery stock prior to the time complainant claims to have secured trade-mark right in the said word.

IX.

Defendants further answering deny that plaintiff's trade-mark has a value in excess of three thousand dollars ($3,000) exclusive of interest and cost, and deny that complainant has any trade-mark of any value whatever.

X.

For further answer, defendants say that they have no information as to what plaintiff might have found with reference to the
8 sale of fruit trees labeled with the words "Wm. P. Stark Nurseries," and of this allegation they call for strict proof. But defendants state that in the conduct of their business they have used the name "Wm. P. Stark Nurseries" and that all of the said name has been printed in plain legible letters, together with the address and location of the nurseries owned and operated by these defendants; and defendants deny that they have used any trade-mark in connection with the sale of any nursery stock sold by them in infringement of plaintiff's trademark or its trademark rights under the law.

XI.

For further answer, and particularly to the allegation of the ninth paragraph of complainant's bill, defendants deny that they ever knew of any claim by complainant of the exclusive right to the use of a trade-mark "Stark Trees" for nursery stock, or that complainant has ever used or claimed the right to use said trade-mark,

prior to the time of receiving said notice on the — day of ——, 1916; and defendants deny that they have with any intent to defraud or deceive, used or advertised the trade-mark "Stark" in conjunction with the representation of any trees or nursery stock; and deny that any mark used or advertised by defendants is calculated to cause or has caused the nursery stock of defendants to be bought as and for the nursery stock of the complainant; and deny that complainant has suffered any loss or that there has been any injury to the public or any infringement of complainant's registered trade-mark or trade-mark rights, or that defendants have profited or complainant been damaged by any such infringement.

XII.

For further answer and particularly to the allegations of the tenth paragraph of complainant's bill, defendants deny that they have ever been notified of any infringement of complainant's trade-mark right, except by the aforesaid notice dated the — day of ——, 1916, and deny that they have infringed or continued to infringe upon any trade-mark or trade-mark right of complainant since the receipt of said notice.

XIII.

For further answer and particularly to the eleventh paragraph of complainant's bill, defendants admit that Wm. P. Stark, one of the defendants herein, was for many years an officer and stockholder and employe of the complainant company, and admit that the said Wm. P. Stark during said time held and now holds about three-tenths (3/10) of the capital stock of the said Company; and defendants admit that during the said time the name Wm. P. Stark became familiar to the readers of the Stark Brothers Nurseries & Orchards Company advertisements; and that defendant Wm. H. Stark was an employe of complainant Company during the year A. D. 1911, and that the name of Wm. H. Stark appeared in the printed books of said Company for the year A. D. 1911. But
9 defendants deny that Wm. H. Stark caused testimonial letters to be addressed to Wm. Stark instead of the Stark Company; and deny that Wm. P. Stark or Wm. H. Stark made any attempt to familiarize the public with their individual names further or other than the manner in which the names of the active officer and managers of the business of Stark Company had for years been made familiar to the public through the publications issued by the Stark Brothers Nurseries & Orchards Company, or further or other than the manner in which the names of the active managers of the said Company have been since 1911, and now are featured and made familiar to the public through such publications; and defendants further deny that any act or thing done by either of the defendants while with the complainant Company was done for the purpose of injuring or taking advantage of the complainant, but allege and charge the fact to be that while connected with the said Company both Wm. P. Stark and Wm. H. Stark gave their best

efforts and services to the promotion of the welfare of the said Company.

Defendants further deny that Wm. H. Stark at the direction of Wm. P. Stark or without his direction, spent several months in looking for a location to compete with the Stark Brothers Nurseries & Orchards Company while employed by the said Company, but allege and charge the fact to be that neither Wm. H. Stark nor Wm. P. Stark had any connection with any other Company or participated in the promotion or management of any other Company until they were deprived of the right and opportunity to participate in the management of the complainant Company.

XIV.

Defendants admit that the nursery first known as the Wm. Stark Nurseries with offices at Louisiana, Missouri, was later moved to the location now known as Stark City, Missouri, and the style of the firm changed to Wm. P. Stark Nurseries, and allege that the said change was made for the reason that the nursery started by Wm. Stark was located at the said place and the name of said Company was changed for the reason that Wm. P. Stark after being deprived of his position with the Stark Brothers Nurseries & Orchards Company joined Wm. H. Stark in the development of a new nursery business, and defendants say that at the time the postoffice of Stark City was established and the name of the town changed to Stark City, complainant Company was not using the address Stark, Missouri, or Starkdale, Missouri, or Stark Station, Missouri, and had not for years used such address, and never at any time in the course of its business used such address for receiving mail or for transacting business of the said Company, and that for years prior to the time of defendants' location at Stark City, Missouri, there had been no postoffice by the name of Stark, Missouri, or Starkdale, Missouri, or Stark Station, Missouri.

XV.

Defendants further answering admit that they have in the course of their business, informed the public, in advertisements and by other means, of the location of their nurseries at Stark City, Missouri, and their offices at Neosho, Missouri, and that they have in advertisements circulated the picture of Wm. P. Stark and called attention to the fact that Wm. P. Stark has been engaged in the nursery business for thirty years, and called the attention of the public to the fact that the name Stark had been associated with the nursery business and that Wm. P. Stark for over a quarter of a century had been associated prominently with nursery work, and that Wm. P. Stark was then engaged in the promotion of a new business, together with Wm. H. Stark, his son, and in the said advertising claimed that defendants, Wm. P. Stark and Wm. H. Stark, were in a better position than ever to carry on and broaden the nursery business in Missouri at their Stark City Plant.

XVI.

For further answer to complainant's bill, defendants say that for more than twenty-five years Wm. P. Stark was associated with the complainant Company and was the owner of a large amount of stock in the said Company, though less than a majority of said stock, and took an active part in the management of the business of the said Company, and that at the request and with the consent and approval of other officers, directors and stockholders of the said Company, the said Wm. P. Stark associated with other nurserymen and people interested in the purchase of nursery stock and became personally known to many people throughout the United States who dealt in or were interested in the growth, development and sale of nursery stock. The said Wm. P. Stark continued his services with the Stark Brothers Nurseries & Orchards Company and gave to the said Company his best efforts and services and severed his connection with the said Company only when he was no longer permitted or allowed by the other stockholders, officers and directors of the Company to do his work, perform his services, or have any connection with the said Stark Brothers Nurseries & Orchards Company, and only at such time did he consider or take any steps looking to the promotion or organization of any nursery business. Defendants, however, say that Wm. P. Stark had spent all of his active life in the nursery business and was not familiar with any other line of business, and Wm. H. Stark, the son of Wm. P. Stark, defendant herein, had been educated and trained for the nursery business and had no experience in any other business, and that the said William P. Stark Nurseries were established and founded by Wm. P. Stark and Wm. H. Stark, not for the purpose of injuring the Stark Brothers Nurseries & Orchards Company but for the purpose of providing for the said Wm. P. Stark and Wm. H. Stark the opportunity of engaging in the only business for which they had special and peculiar knowledge, and in which they had had experience.

Defendants further state that at the time of the organization of the Wm. P. Stark Nurseries, Wm. P. Stark was and now is the owner of about three-tenths (3/10) of the stock of the Stark
11 Brothers Nurseries & Orchards Company and is interested in the development and prosperity of the said Company.

XVII.

Further answering, these defendants say that Wm. P. Stark Nurseries has never at any time displayed for sale fruit trees to which the name "Stark" was attached, or to which there was attached any trade-mark or trade-name in any way similar to the trade-mark or trade-name claimed by complainant. In fact, Wm. P. Stark Nurseries has never at any time or place displayed trees or other nursery stock to purchasers as an inducement to purchase such trees or stock and has never at any time or place carried or

displayed any stock of trees of any sort what-ver, except the trees in the packing houses at its plant at Stark City, Missouri.

Defendants further say that in the course of their business they have not sold trees to purchasers through the display of the trees themselves at any time or place but have conducted their business entirely by mail; have employed no agents or dealers or representatives of any kind for the sale of their stock, but that all of their stock has been disposed of by orders through the mail. In securing such orders defendants have published advertisements in various publications of national circulation and issued catalogues which have been sent to persons inquiring therefor in answer to the advertisements published by defendants, and in all of said advertisements and in the said catalogues defendants have carefully warned the public that they were not connected with any other concern of similar name, and have published the full name "Wm. P. Stark Nurseries, Stark City, Missouri" in large, clear and legible type, in their catalogues and on every page thereof and in all of their advertisements and on their letterheads on which all of their correspondence has been carried on. Complainant Company has for many years in its advertisements and literature emphasized the fact that it was located at Louisiana, Missouri, and defendants have in all their advertisements and literature made clear to the public that they were located at Stark City, Missouri. Defendants have in their advertisements and by circular letters stated that they employed no agents but sold their product direct to the purchaser and have warned persons that any one representing himself to be an agent of Wm. P. Stark Nurseries was misrepresenting the facts and his claims were false. These statements in their advertisements, defendants state were for the purpose of informing the public that defendants had no connection whatever with the complainant Company which has for many years conducted the greater part of its business through agents, and has conducted only a small part of its business on the mail order plan.

XVIII.

Further answering, these defendants say that they have never at any time accepted an order addressed to or intended for the complainant Company, but allege and state the fact to be that
12 the agents of the complainant have represented to persons who had read the advertisements of defendant that they, the said agents, were representing the same Company and have solicited orders and secured orders, on account of such false representations, which were intended for the defendants and which would have been sent to the defendants except for the said false reprsentations of said agents.

Defendants further charge and allege the fact to be that complainant sought to employ a person at Stark City, Missouri, more than four hundred (400) miles from the location of their main offices, to rent a box at the postoffice at Stark City, Missouri, where defendants' nurseries are located, and to have mail put in the said

box and forwarded to the office of the complainant Company at Louisiana, Missouri, that complainant Company never maintained an office at Stark City, Missouri, and had no nurseries located at said place, and that said attempt was made with the deliberate design and purpose of securing for complainant Company mail and orders which were intended for defendants.

XIX.

Further answering, defendants say that if the Stark Brothers Nurseries & Orchards Company has lost agents or has lost old customers because of the business of Wm. P. Stark Nurseries, the said agents and customers have been lost with the full knowledge that the Wm. P. Stark Nurseries was a concern entirely separate, apart and different from the Stark Brothers Nurseries & Orchards Company, and the said customers have been lost for the reason that Wm. P. Stark Nurseries have offered and sold their product at a much lower price by mail direct to the consumer than the price at which complainant sold through its agents; and if agents of complainant have been lost on account of the activities of the Wm. P. Stark Nurseries it has been because the said agents could not sell the product of complainant in competition with the products of the defendants sold direct to the planter.

XX.

For further answer, defendants say that they have exercised great care to distinguish the business carried on by them from the business of Stark Brothers Nurseries & Orchards Company, and have taken every precaution in their advertisements and letters and in their catalogues to refrain from disparaging the said Stark Brothers Nurseries & Orchards Company or the products offered for sale by the said Company, and have used the name "Stark" only in connection with the name Wm. P., and the location of defendants' nurseries, and whatever injury or damage the complainant may have suffered on account of the establishment of the Wm. P. Stark Nurseries has been due to fair and open competition by the said Company.

13 Wherefore, having fully answered defendants pray to be discharged and that they recover from complainants their costs in this behalf expended.

XENOPHON P. WILFLEY,
WILFLEY, McINTYRE & NARDIN,
St. Louis, Mo.;
PEARSON & PEARSON,
Louisiana, Mo.,
Attorneys for Defendants.

Filed in the District Court of the United States October 7, 1916.

(Plaintiff's Motion to Strike Out and Notice.)

Motion.

And now comes the Stark Bros. Nurseries & Orchard Company and moves to strike paragraphs II and III from the answer filed in the above mentioned cause for the following reasons:

1st. Paragraph II of the answer does not comply with the Equity Rules (more particularly Rule 29) in that the matter contained therein should have been raised by motion to dismiss instead of by way of demurrer in the answer.

2nd. Because paragraph II does not comply with the Equity Rules (more particularly Rule 29) in that the question of whether this court has jurisdiction of unfair competition, in a suit between citizens of the same state, for infringement of a registered trade-mark, should be raised by motion to strike.

3rd. Because this court has jurisdiction of unfair competition in a suit directly involving the infringement of a registered trade-mark, even though the parties are citizens of the same state. Paragraph III of the answer should therefore be stricken from the answer for this reason as it sets up no defense.

STARK BROS. NURSERIES &
ORCHARDS CO.,
By ANDREW B. REMICK,
JOHN W. MATSON,
Its Attorneys.

Notice.

Sirs:

Please take notice that on Monday, November 27th, 1916, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall submit to the District Court of the United States in and for the Southwestern Division of the Western District of Missouri at Kansas City, Missouri, either in open court or in chambers, for its consideration and determination, the accompanying motion to strike paragraphs II and III of the answer
14 filed in the above entitled cause. Copies of the motion and notice are served on you herewith.

Respectfully,

ANDREW B. REMICK,
JOHN W. MATSON,
Attorneys for Stark Bros. Nurseries & Orchards Company.

To Wilfley, McIntyre & Nardin, Boatmen's Bank Building, St. Louis, Missouri.

Dated St. Louis, Mo., November 10th, 1916.

Service of the foregoing motion and notice, with a copy thereof, acknowledged this 10th day of November, 1916, hearing to be set for November 27th, 1916, at 10 o'clock.

WILFLEY, McINTYRE & NARDIN,
Attorneys for William P. Stark Nurseries.

Filed in the District Court of the United States Nov. 13, 1916.

(Final Decree.)

This cause having come on to be heard upon the pleadings and proofs, and counsel for the respective parties having been heard, and the court being full advised in the premises, now, upon consideration thereof,

It is ordered, adjudged and decreed that the name "Stark Trees" has been a trade-mark upon fruit trees and nursery products for twenty-five years last past; that on June 24, 1913, said trade-mark was duly registered under the ten year clause of the Act of Congress of February 20, 1905, in the United States Patent Office, and is a valid and subsisting trade-mark under said Act of Congress.

That the complainant Stark Bros. Nurseries & Orchards Company is, and ever since the year 1891 has been, the exclusive owner of said trade-mark, during all said time has carried on the business at the City of Louisiana in the State of Missouri, of propagating, growing and selling fruit and nursery stock, and during all said time has used upon the boxes and packages containing said fruit trees grown and sold by it a label or stamp bearing the words "Stark Trees" as a trade-mark.

That the defendants herein, William P. Stark and William H. Stark, Trustees, doing business under the name and style of William P. Stark Nurseries, have infringed upon the said trade-mark, and upon the exclusive rights of the complainant under the same, by selling prior to and since the commencement of this suit fruit trees and nursery stock, to which parcels and packages containing the same said defendants have attached a tag or label bearing in conspicuous printed letters the words "Nursery to Orchard. William P. Stark Nurseries, Stark City, Mo.," together with the picture of a tree, said name "Stark" being prominently printed across the picture of the tree, thus plainly suggesting the term "Stark Trees"; that said label was widely exploited by said defendants in extensive advertising, all in imitation and infringement of the trade-mark "Stark Trees," as charged in the bill of complaint.

That during a period prior to the actual starting of the nursery now conducted by defendants the complainant had widely featured in its advertising matter the addresses "Stark, Mo.," "Starkdale, Mo.," and "Stark Station, Mo.," all of which was well known to said defendants; that said defendants caused the name of the post office of the town of Chester, Missouri, to be

changed to Stark City, Missouri, adopted Stark City as an address and extensively advertised said address in their literature and in connection with their business with the intention of misleading the public into the belief that defendants' nursery was that of the original Stark Nursery Company; by such action defendants intended to and did mislead the public, and intended to and did gain an unfair advantage in trade to the injury of the prestige and business of the complainant company.

It is further ordered, adjudged and decreed that by reason of their infringement of said trade-mark "Stark Trees," and by reason of their wrongful use of the name "Stark" and the address "Stark City," the complainant do recover of the defendants, William P. Stark, William H. Stark and the William P. Stark Nurseries all gains and profits which said William P. Stark, William H. Stark and the William P. Stark Nurseries have derived, received or made during the period within which complainant's said trade-mark is shown to have been infringed beginning with the 11th day of March, 1914, and that said complainant do also recover from said William P. Stark, William H. Stark and the William P. Stark Nurseries any and all damages which complainant has sustained by reason of defendants' infringement and unfair competition from and after the 26th day of August, 1916, on which date complainant gave notice to defendants of the registration of its said trade-mark.

This cause is hereby referred to George A. Neal, Esq., of Kansas City, Missouri, as Master of this court to take and state the accounting of said gains and profits, and to assess such damages and report thereon with all convenient speed, and said defendants are hereby directed and required to attend before said Master by its officers, partners, agents and employees from time to time as required, and to produce before him such books, papers and documents as relate to the matter at issue, and to submit to such oral examination as the Master may require.

Said Master, in the taking of said accounting and ascertaining said damages, may, if he finds it reasonably necessary so to do, employ an expert certified accountant to assist him in taking said accounting and determining said damages, and may further employ a stenographer to take down the evidence, or any part thereof, that may be submitted in this cause and afterwards transcribe the same, and all reasonable costs and expenses incurred by said Master
16 in the premises shall be taxed as costs against said defendants and recovered as other costs that are authorized to be paid by defendants.

It is further ordered, adjudged and decreed that a perpetual injunction issue out of and under seal of this court enjoining and restraining the defendants, William P. Stark and William H. Stark, as trustees or individually, and the William P. Stark Nurseries, their officers, clerks, attorneys, agents, servants, workmen, and all persons claiming or holding under or through them, from the direct or indirect use of the infringing label charged or any colorable imitation of complainant's trade-mark in suit, from putting the word "Stark" prominently at the top of its labels, or elsewhere in con-

nection with the business of producing, advertising and selling nursery stock, in such manner as will not unmistakably differentiate their goods and advertisements from those of the complainant's, and from using the name or address "Stark City" upon their labels or tags attached to nursery stock or packages containing the same or from using the address "Stark City" in advertising their business and wares.

It is further ordered, adjudged and decreed that the complainant recover of the defendants its costs of this action, taxed in the sum of — dollars.

Kansas City, Missouri, February 26th, 1918.

ARBA S. VAN VALKENBURGH,
Judge.

Filed in the District Court of the United States Feb. 26, 1918.

(*Petition for Appeal.*)

To the Honorable Arba S. Van Valkenburgh, Judge of the United States District Court, Southern Division of the Western District of Missouri:

The above named defendants, feeling aggrieved by the decree rendered and entered in the above entitled cause, on the 26th day of February, 1918, do hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the assignment of error filed herewith, and they pray that this their appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, and the exhibits filed in the trial of said cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit, under the rules of such court in such case made and provided.

Petitioners further pray that the amount of security may be fixed by the order allowing this appeal.

XENOPHON P. WILFLEY,
PEARSON & PEARSON,
WILFLEY, McINTYRE,
NARDIN & NELSON,
Attorneys for Defendants.

Filed in the District Court of the United States March 26, 1918.

17 (*Assignment of Errors.*)

Now come the defendants in the above entitled cause and file the following assignment of errors upon which they will rely in their prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court, on the 26th day of February, 1918:

1st. The court erred in not holding that the bill of complaint does not state facts sufficient to constitute a cause of action, and in denying the defendants' motion to dismiss the bill.

2nd. The court erred in not holding that the District Court of the United States for the Western District of Missouri, has no jurisdiction to try the issue of unfair competition sought to be raised in the bill of complaint—it appearing from the face of the bill that there is no diversity of citizenship, or other ground of Federal jurisdiction—and in denying the defendants' motion to dismiss the bill for want of jurisdiction.

3rd. The court erred in receiving the following testimony: All letters introduced as exhibits with the deposition of Paul Stark, witness for plaintiff, being Exhibits Nos. X-57 to X-164, because they are hearsay. There is no evidence that they were written by the persons whose names are signed to the several letters and postal cards. There is not sufficient identification of the letters and postal cards. They are incompetent, irrelevant and immaterial to any issue in the case.

4th. The court erred in receiving in evidence the following documents: Exhibits Nos. X-165 to X-187, introduced with the deposition of Paul Stark, because they are hearsay. They are not sufficiently identified to make them competent, relevant or material to any issue in this case.

5th. The court erred in receiving in evidence any and all letters offered by plaintiff, as not one of them which was properly identified was competent, relevant or material to any issue in this case.

6th. The court erred in finding that the complainant had right to the sole and exclusive use of the term "Stark Trees."

7th. The court erred in finding the following facts: That the complainant, Stark Brothers Nurseries & Orchards Company, is, and ever since the year 1891 has been, the exclusive owner of the trade-mark "Stark Trees," and in finding that the name "Stark Trees" is a valid and subsisting trade-mark under the ten-year clause of the Act of Congress of February 20, 1905.

8th. The court erred in finding the following facts: That the defendants herein, William P. Stark and William H. Stark, Trustees, doing business under the name and style of William P. Stark Nurseries, have infringed upon said trade-mark, and upon the exclusive right of the complainants under the same, by selling prior to, and since the commencement of, this suit, fruit trees and
18 nursery stock, to which parcels and packages containing the same said defendants have attached a tag or label bearing in conspicuous printed letters the words "Nursery to Orchard. William P. Stark Nurseries, Stark City, Mo.," together with a picture of a tree, said name "Stark" being printed prominently across the picture of the tree, thus plainly suggesting the name "Stark Trees"; that said label was widely exploited by said defendants in extensive advertising, all in imitation and infringement of the trade-mark "Stark Trees," as charged in the bill of complaint.

9th. The court erred in finding the following facts: That during a period prior to the actual starting of the nurseries now conducted by the defendants, that complainant had widely featured in its advertising matter the addresses, "Stark, Mo.," "Starkdale, Mo.," "Stark Station, Mo.," all of which was well known to said defendants; that said defendants caused the name of the post office of the town of Chester to be changed to "Stark City, Mo.," adopted Stark City as an address, and extensively advertised said address in their literature, and in connection with their business, with the intention of misleading the public into the belief that defendants' nursery was that of the original Stark Nurseries Company; that by such acts defendants intended to and did mislead the public; and intended to and did gain an unfair advantage in trade to the injury of the business and prestige of the complainant company.

10th. The court erred in finding that the defendants for some time prior to the dates on which they severed their active connection with the complainant company, were exploiting their individual names and personalities through the literature of the complainant corporation and otherwise were engaging in other activities with a view of setting up a competitive business, and of appropriating a portion of the prestige which had been acquired and which was being enjoyed by complainant.

11th. The court erred in decreeing that complainants recover of defendants William P. Stark, William H. Stark and the William P. Stark Nurseries all gains and profits which the said William P. Stark, William H. Stark and William H. Stark Nurseries have derived, received or made during the period within which complainant's said trade-mark is held to have been infringed, beginning with the 11th day of March, 1914.

12th. The court erred in decreeing that complainant recover from said William P. Stark, William H. Stark and William P. Stark Nurseries any and all damages which complainant has sustained by reason of defendants' infringement and unfair competition from and after the 26th day of August, 1916.

13th. The court erred in granting a perpetual injunction, enjoining and restraining the defendants, William P. Stark and William H. Stark as Trustees, or individually, and the William P. Stark Nurseries, their officers, clerks, attorneys, agents, servants, workmen, and all persons claiming under and through them, from
19 the direct, or indirect, use of the infringing label charged, or any colorable imitation of plaintiff's trade-mark in suit, from putting the word "Stark" prominently at the top of their labels, or elsewhere in connection with the business of producing, advertising and selling nursery stock in such manner as will not unmistakably differentiate their goods and advertisements from those of complainant, and from using the name or address "Stark" upon their labels or tags attached to nursery stock or packages containing the same, or from using the address "Stark City" in advertising their business and wares.

14th. The court erred in finding the issues for plaintiff.

15th. The court erred in finding that defendants had been guilty of unfair competition with plaintiff.

16th. The court erred in not finding as follows, as proposed by the defendants: There is no trade-mark infringement in this case, and the plaintiff and defendants being citizens of the same state, this court has no jurisdiction to try the issues as to unfair competition.

17th. The decree is against the manifest weight of the evidence.

18th. The decree is contrary to law.

Wherefore, appellants pray that said decree be reversed and that said United States District Court for the Western District of Missouri be ordered to enter a decree reversing the decision of the lower court in said cause.

XENOPHON P. WILFLEY.
PEARSON & PEARSON,
WILFLEY, McINTYRE & NARDIN.
Attorneys for Appellants.

Filed in the District Court of the United States Mch. 26, 1918.

(*Order Allowing Appeal.*)

On motion of Xenophon P. Wilfley, Esq., solicitor and counsel for defendants, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from the decree heretofore filed and entered, be and the same is hereby allowed, and that a certified transcript of the record, testimony and all proceedings, and the exhibits offered in evidence, be forthwith transmitted to said United States Circuit Court of Appeals for the Eighth Circuit.

It is further ordered that the bond on appeal be fixed at the sum of one thousand dollars, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Dated this 26th day of March, 1918.

ARBA S. VAN VALKENBURGH,
Judge.

Filed in the District Court of the United States Mch. 26, 1918.

20 (*Bond on Appeal.*)

Know All Men by These Presents, That we, William P. Stark and William H. Stark, Trustees, doing business under the name and style of William P. Stark Nurseries, as principal, and the Equitable Fidelity & Guaranty Company, as surety, are held and

firmly bound unto Stark Brothers Nurseries & Orchards Company, in the full and just sum of one thousand ($1,000.00) dollars, to be paid to the said Stark Brothers Nurseries & Orchards Company, its certain attorneys, successors, or assigns; to which bond well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents:

Sealed with our seals and dated this the 15th day of March, A. D. 1918.

Whereas, lately at a term of the District Court of the United States for the Western District of Missouri, Southwestern Division, in a suit depending in said court between Stark Brothers Nurseries & Orchards Company, as plaintiff, and William P. Stark and William H. Stark, Trustees, doing business under the name and style of William P. Stark Nurseries, as defendants, a decree was rendered against said William P. Stark and William H. Stark, Trustees, doing business under the name and style of William P. Stark Nurseries, and the said William P. Stark and William H. Stark, Trustees, doing business under the name and style William P. Stark Nurseries, having obtained an appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and filed a copy thereof in the clerk's office of said court, to reverse the decree in the aforesaid suit, and a citation directed to the Stark Brothers Nurseries & Orchards Company, citing and admonising it to be and appear at a session of the United States Circuit Court of Appeals for the Eighth Judicial Circuit to be holden at the City of St. Paul in the State of Minnesota, in said circuit, on the first Monday in May next:

Now the condition of the above obligation is such that if the said William P. Stark and William H. Stark, Trustees, doing business under the name and style of William P. Stark Nurseries, shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

W. P. STARK,
W. H. STARK,
By W. P. STARK,
Trustees Doing Business as William P. Stark Nurseries, Principal.

UNITED STATES FIDELITY & GUARANTY COMPANY, *Surety,*
By E. R. NIEHAUS,
[SEAL.] *Attorney in Fact.*

21 Signed and delivered in the presence of:
XENOPHON P. WILFLEY.

Approved by:

ARBA S. VAN VALKENBURGH,
Judge.

Filed in the District Court of the United States Mch. 26, 1918.

(Waiver of Citation.)

Now on this day comes A. B. Remick and John W. Matson, attorneys of record for plaintiffs, the appellee herein, and do hereby waive citation on appeal in this cause from this court to the United States Circuit Court of Appeals for the Eighth District and enter the appearance of Stark Brothers Nurseries & Orchards Company herein.

A. B. REMICK AND
JOHN W. MATSON,
Attorneys for Appellees.

Filed in the District Court of the United States Mch. 26, 1918.

(Stipulation as to Exhibits.)

It is hereby stipulated and agreed by and between plaintiff and defendants in the above entitled cause through their respective counsel, that all original exhibits introduced in evidence in this case may be certified to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, in lieu of having same printed in the transcript of the record.

ANDREW B. REMICK AND
JOHN M. MATSON,
Counsel for Plaintiff.
XENOPHON P. WILFLEY,
PEARSON & PEARSON,
WILFLEY, McINTYRE,
NARDIN & NELSON,
Counsel for Defendants.

Filed in the District Court of the United States, Mch. 26, 1918.

(Order as to Exhibits.)

On stipulation this day filed and presented, it is ordered that the clerk of this court be and he is hereby authorized to omit from the transcript of the record on appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, all the original exhibits in this case; that said original exhibits be delivered intact by the clerk of this court to the clerk of said Court of Appeals at the time of the delivery of said transcript on appeal.

ARBA S. VAN VALKENBURGH,
Judge.

Filed in the District Court of the United States Mch. 26, 1918.

22 (*Præcipe for Transcript.*)

To John B. Warner, Esq., Clerk of the Above Court:

The clerk of this court is hereby directed to prepare and certify a transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals for the Eighth Judicial Circuit, on the above case, including therein the following:

1. Bill of complaint and Exhibits "A," "B," and "C," accompanying same.

2. The answer of defendants.

3. Plaintiff's motion to strike and court's memorandum on same.

4. The transcript of the evidence prepared and filed by appellants.

5. Stipulation of counsel for plaintiff and defendants for transmitting all original exhibits to the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

6. The order of the District Court transmitting all original exhibits to the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

7. Memorandum of final hearing of the District Court.

8. Supplemental memorandum on settlement of decree.

9. The decree.

10. The petition for appeal.

11. The assignment of errors.

12. Order Allowing Appeal.

13. Bond on Appeal.

14. Waiver of citation and entry of appearance.

15. Præcipe for Transcript.

16. Notice of Filing of Præcipe.

17. Order as to statement of Evidence.

18. Election as to Printing.

XENOPHON P. WILFLEY,
PEARSON & PEARSON,
WILFLEY, McINTYRE &
NARDIN,
Counsel for Appellants.

Filed in the District Court of the United States Mch. 26, 1918.

(*Notice of Filing Præcipe.*)

To Andrew B. Remick and John W. Matson, Attorneys for Appellee:

Please take notice that on the 26th day of March, 1918, the undersigned filed with the clerk of this court a Præcipe of the Record to be transmitted to the United States Circuit Court of Ap-
23 peals for the Eighth Judicial Circuit, on the appeal taken in the above case, a copy of which præcipe is herewith served on you.

Dated this the 26th day of March, 1918.

XENOPHON P. WILFLEY,
PEARSON & PEARSON,
WILFLEY, McINTYRE,
HARDIN & NELSON,
Counsel for Appellants.

Service of the within Notice and copy of Præcipe is hereby accepted, this the 26th day of March, 1918.

ANDREW B. REMICK,
JOHN W. MATSON,
Counsel for Appellee.

Filed in the District Court of the United States Mch. 26, 1918.

(*Agreed Statement of Evidence.*)

Evidence Introduced by Plaintiff.

Deposition of E. W. Stark.

E. W. STARK, in his deposition taken at Louisiana, Missouri, and read in evidence in this case, testified as follows:

That he was sixty years old; the President of Stark Brothers Nurseries & Orchards Company, the plaintiff herein, with which Company he has been connected since its incorporation in 1889, and prior thereto; that he understood that this was a suit for infringement of trademark and unfair methods of competition against the William P. Stark Nurseries of Neosho, Missouri. That plaintiff is engaged in the general nursery business, meaning the growing and selling of trees primarily, and other nursery products, shrubs, roses, etc. That plaintiff does a business throughout this country and in a number of foreign countries, and has for many years, especially throughout this country; that the principal offices of plaintiff Company are near Louisiana, Missouri, formerly in Louisiana, Missouri. Prior to the incorporation of plaintiff Company, witness was a member of Stark & Company, composed of three brothers—Clarence M. Stark, William P. Stark and the witness. That Stark Bros. Nursery Company, and its predecessors, have been in the nursery business at or near Louisiana, Missouri, for more than fifty years to witness'

certain knowledge, and much longer than that to the best of his knowledge and belief.

That plaintiff Company has three different and distinguishing marks or brands or trademarks, called at different times the "Old Oak Process," another "Stark Trees," another "Stark Trees Bear Fruit" over the picture of a bear; that the trademark "Stark Trees" has been used on shipping tags, as a stencil, and as a card attached to the boxes. The card was used in the spring of 1893 tacked to the end of boxes of shipments, of trees.

24 Witness was shown plaintiff's Exhibit 1, the "Stark Trees" label, and he testified that the same was the card now used, except that the cards varied in size; that the label "Stark Trees" has been continually used since 1893 in the shape of a card or stencil, sometimes both stencil and card would be on the same box. These boxes contained trees of the plaintiff Company ready for shipment, and which were actually shipped to various parts of the country. Witness testified that "To the best of my knowledge practically all of our boxes since 1893 have had either the card or stencil upon each box sent out."

Witness further testified that the plaintiff Company made application in January, 1913, to register the words "Stark Trees" as a trademark in the United States Patent Office. This trademark was granted to plaintiff Company on the 24th day of June, 1914, as register No. 92282. The original certificate of trademark from the United States Patent Office at Washington, D. C., was introduced and marked plaintiff's Exhibit No. 2. This is a registration of the "Stark Trees" trademark similar to design in Exhibit No. 1.

In answer to the question, "Has your Company and its predecessors spent any money in advertising or making known the "Stark Trees" trademark, like Exhibits 1 and 2, and if so by what method or methods?", the witness answered, "Our Company has spent large sums of money advertising our products. Our Company has advertised the Stark Nursery and its product, Stark Trees, in various sections for many years, extensively. Our total expenses since 1893 have been heavy, making a large total. Since 1889, to date, they have been particularly heavy. The effort of our company to make Stark Trees and the word "Stark" household words among tree planters throughout the country and foreign countries——

Q. Who prepared the advertising of your Company prior to 1912?

A. Our brother, Clarence M. Stark, now deceased, was our advertising man up until his breakdown in 1903. Since that time, W. P. Stark and his son-in-law, W. P. Stark having charge and the son-in-law acting as publicity or advertising man from 1908 to 1913; since then my brother, Clarence M. Stark's son—Lloyd C. Stark, has been in general charge of our advertising."

The W. P. Stark above mentioned is one of the defendants in this case.

W. P. Stark was advertising manager until the latter part of June, 1912. Since that time Lloyd C. Stark has been general advertising manager.

Witness testified to certain sums spent for advertising, to which

attorneys for defendants objected on the ground that witness at no time had charge of the advertising department of plaintiff Company, and did not know and could not know what moneys were expended in the various lines of advertising, except from what somebody had told him, and from records, and these records are the best evi-
25 dence of the money spent in the various lines of advertising, and that the paper from which the witness read was a copy of some book of original entry which was not kept by the witness, and the book of original entry would be the best evidence, and furthermore, it appeared from the evidence that the witness had these figures made out by some clerk or other person and that he knew nothing about the correctness or accuracy of the same.

The court overruled the objections made by attorneys for defendant at the time the deposition was read at the trial, to which ruling the attorneys for defendant then and there duly excepted.

The testimony on this point is as follows:

In 1909 our straight newspaper and periodical advertising totaled $10,409.21, not including a large amount of what we call "exchange advertising." I wish to remark here that we have no record of this "exchange advertising" in any one year, although we have spent large sums in so-called "exchange advertising" by which the Company exchanges its merchandise of trees, plants, shrubs, etc., for advertising. The catalogue, paper and printing in 1909 totaled over $3,800.00; postage and postals, $10,960.00; sample apples over $3,000.00—a total of $20,227.10 for the year 1909. Practically all of this total is properly chargeable to advertising. In addition the exchange advertising would materially increase this amount. Also office labor which has varied from $25,000.00 to $50,000.00 per year for the past eight (8) years is not charged nor included in this sum total. These same items in 1910, that I have given for 1909 expenditure for advertising account, total $82,314.06. In 1911 the same items total $68,833.25; in 1912 the same items total $58,851.23. A grand total for the four (4) years of $238,226.64 exclusive of exchange advertising and office labor. For the four (4) years, 1913 to 1916 inclusive, the total for the four years of straight periodical and newspaper advertising totaled $83,307.42, as compared to $51,337.34 for the previous four (4) years, namely, from 1909 to 1912 inclusive. Catalogues, paper and printing for the four (4) years from 1913 to 1916 inclusive totaled $77,543.10; postage and postals for the four years, 1913 to 1916 inclusive, totaled $74,393.75; sample apples $7,720.32 for the same four years. A grand total for the four years, 1913 to 1916, inclusive, $242,964.59, exclusive of exchange advertising, office labor and various other items properly chargeable to advertising account but not so charged by our company.

(By Mr. Pearson: We object to the above testimony for reasons heretofore stated in previous objections to this question.)

Q. 30. Mr. Stark, how do you arrive at these figures?
A. They are taken from our books.
Q. 31. Did you compile these figures from your books yourself?

A. In connection with Mr. Culver, the head of our Accounting Department. These various statements have been gotten out.
26 We have frequently gone over together the various charges on our books for a number of years past, that being a part of my duties, and is very closely watched by myself.

Q. 32. The memorandum from which you refreshed your memory in the preceding answer as to the amount of money spent for advertising of the different sorts, you say, was prepared by Mr. Culver under your supervision?

A. This particular memorandum, as I recall, was dictated by Mr. Culver, but at various times in the last eight (8) years, particularly at the close of our year—May 31st, annually—in connection with Mr. Culver and the prior head of that department, I have gone over and verified in a general way the different charges upon our books. In other words, I have kept fairly close in touch and have been familiar with the outgo of the funds of our company."

Witness testified that plaintiff company sold through mail order. Prior to 1893 the bulk of the sales were made through salesmen. Since 1893 the company has advertised very extensively by various methods and have sold largely through the department called the "Mail Order," to designate it from the retail, which is sold through salesmen. Since 1893 the mail order sale has been a large per cent of the total sales. "In the years 1909 to 1912 inclusive, the four (4) years averaged, as I recall, $273,000 per year, that being the average for the four (4) years. The four (4) years since the Wm. P. Stark Nurseries have been doing business, our mail sales for the four years have totaled $176,000 in round numbers, as I recall the figures, a falling off of approximately $97,000 per year for the four (4) years, 1913 to 1916, inclusive, as compared to the prior four (4) years, 1909 to 1912, inclusive."

Counsel for defendants objected to the testimony covered by the above quotation, and asked that it be stricken out because it was not responsive to any question, simply a dissertation on the business which was acquired from hearsay by the witness; which objection was overruled and counsel for defendants then and there duly excepted.

Witness testified further:

Q. Mr. Stark, how did you arrive at the amount of these sales?

A. In a general way, I have been in close touch weekly during these eight years about the total amount of the sales. I have recently refreshed my memory by looking over the sales book. The figures I have given are approximately correct to the best of my knowledge and belief."

Practically all mail order sales are put in boxes, excepting small shipments that go by express. These boxes have been shipped with the "Stark Trees" trademark attached to the box. These shipments have been made throughout the United States and into a number of foreign countries; "the great bulk of our trees are sold in the United States, although for many years past we have shipped more or
27 less trees each year to the several foreign countries. Practically all boxes since and including 1893 have had either a stencil or

a card bearing our trademark "Stark Trees" attached to the box similar to Exhibit No. 1. Our salesmen work throughout the year soliciting orders for trees which are made payable at the point of delivery. In many of the states we have inspectors—these trees must pass through the inspector's hands and sometimes trees are thrown out. The trees which I delivered in Washington, the six carload shipment I spoke of, quite a number of trees were thrown out, the balance being delivered or sold out of the boxes. I will state here that throughout the year we receive hundreds of countermands, which, as a rule, we pay no attention to, where the buyer writes us not to ship the trees, but as a rule we ship the trees where the man objects—The hundreds of different salesmen, whose statements we make up at the end of the season, invariably more or less trees are marked "on hand," same being sold at a discount, or the final statement by the collector being sent in so many trees on hand which they were unable to sell. As a matter of fact, the great bulk of the shipments have more or less trees that are not delivered but these trees are sold to sundry buyers at point of delivery. I will say further that all of our retail shipments, the money is collected when the trees are delivered, the man having agreed to receive and pay for trees on arrival."

"We have for many years received testimonials from customers who have stated that their fathers and grandfathers before them, at long intervals, have bought Stark trees and have been pleased with them. I wish to say here that nursery catalogues, ours in particular, have a world of information in regard to the time of ripening of the different varieties and other valuable information to a grower of fruit, that these catalogues are preserved for many years, also enclosures, such as order blanks and blank post cards come in years later from recipients of these catalogues. We have cards sent out in 1911, printed postal cards, directed on the face, to William P. Stark, Treasurer, that were sent out in 1911 and came in in 1914."

Counsel for defendants objected and asked that this be stricken out because the post cards and directions thereon are the best evidence; which objection being overruled, counsel for defendants then and there duly excepted.

Witness testified: "I have here a card on the front which reads 'William P. Stark, Treasurer Stark Bros. N. & O. Co., Louisiana, Mo., U. S. A.' I identify this as one of a large number of cards mailed out in 1911. On the back of it, under date of February 4th, 1914, this man forwarded this card to our company. The recipient of this card—Louis Eslinder, Valparaiso, Indiana,—the different questions printed on the back he has answered here and asks for our literature."

This card was offered in evidence as plaintiff's Exhibit No. 3.

Counsel for defendants objected to this exhibit as incompetent, irrelevant and immaterial, and further objected to it because
28 the post card had not been identified as to the signature and as to the other writing in script filled in on the back of it, that it is hearsay, that there is no evidence as to whom it was sent,

when, nor that the party who has used it was the party to whom it was sent or that the postal was received through the U. S. mail, which objections were overruled and to which ruling of the court the attorneys for defendants then and there duly excepted.

Witness testified that Exhibit No. 3 was received in due order of business through the mails to the best of his knowledge and belief; "I wish to state further that a large number of similar post cards were sent out in 1911 and the same were taken to William P. Stark's desk when they came back."

Q. Mr. Stark, what popular designation has your nursery been known by from its inception?"

Counsel for defendants objected to the question on the ground that it called for a conclusion from the witness, and that it was incompetent, irrelevant and immaterial; which objection was overruled and counsel for defendants then and there duly excepted.

A. "Generally known as the Stark Nursery—generally spoken of as Stark trees and Stark Orchards. I wish to say here that our nursery, we claim, is the oldest in the country and prior to the eighties a large per cent of the trees sold in this country—west of the river especially—came from eastern states and they were commonly spoken of as 'Eastern Trees' and the 'Stark Trees' spoken of as 'Stark Trees' and 'Stark Orchards.' At an earlier time, in the fifties and sixties, my father and one of his brothers, and later William Stark alone, conducted a nursery commonly known as 'William Stark Nursery.'"

Q. Did you ever hear of any other nursery in any way containing the name 'Stark' besides the William P. Stark Nurseries or the William Stark Nursery, which was conducted by William P. Stark?

A. Of my knowledge, I don't recall of ever having heard any where in America a nursery except our own known as the Stark Nursery, or in which a Stark was interested. I will add to that—my understanding is that an uncle of mine in Southwestern Missouri handled more or less of my father's trees in the sixties and seventies and may have grown a few trees of his own, but not to my knowledge. That was Captain Washington Stark of Windsor, Mo.

Q. Mr. Stark, isn't there one exception, as suggested in the question above, about William P. Stark being the only one to your knowledge using the Stark name?

A. He is the only man I know of who has used the Stark Nursery except our own.

Q. Was William P. Stark, one of the defendants herein, an employe, officer or stockholder of the plaintiff company?

A. Since 1889 he has been connected with our company. It was incorporated in '89; prior to that time he was a partner of the firm of Stark & Co.

29 Q. What was William P. Stark's duties just prior to his withdrawal as an employe from the company?

A. His official title was 'treasurer' of the Stark Bros. Nurseries & Orchards Company, in general charge of the offices, and com-

mostly acted as general manager, particularly in regard to the selling and all office work.

Q. Did you then designate him as having been general manager of your company?

A. Yes,—the last few years especially of his connection with our company—an employe connected with our company. He has not been connected with this company officially since 1912. I mean our fiscal year ending June, 1912, when W. P. Stark withdrew from our company."

Witness further testified that while William P. Stark was general manager of plaintiff company, he had the opportunity to familiarize his personal name, and the name of his son, William H. Stark, who is one of the defendants, to the readers of plaintiff company's extensive advertising.

Q. You state in the preceding answer that he took advantage of the opportunity—how did he take advantage of the opportunity to familiarize his personal name and that of William H. Stark to the readers of the company's extensive advertising?

A. In 1911 William H. Stark, who was under the direction of his father, got out what we call "The Planting Book" with the name of "William H. Stark"——

(By Mr. Pearson: We object to that part of his answer that he was under the direction of his father, he should state the facts.)

(By Mr. Matson: If that isn't a fact, then what is it?)

Q. Mr. Stark, your company alleges in the 11th paragraph of its bill "that William P. Stark, one of the defendants herein, was an employe, officer and stockholder—holding about 3/10 of the capital stock—of the Stark Bros. Nurseries & Orchards Company, hereinafter referred to as the Stark Company for a number of years, during which time he attempted to and did familiarize his name to readers of the Stark Company's general advertising which reached millions of readers; while in the Stark Company's Planting Book in 1911 the name of "William Stark" appeared about 16 times, with no mention of the Stark Company, and William H. Stark caused letters addressed to the Stark Company to read "William Stark." Upon what do you base that allegation?

A. This book was gotten out under the direct orders of W. P. Stark.

Q. What book are you referring to?

A. First issue of the "Stark Orchard Planting Book" by William H. Stark.

Q. Have you that book with you?

A. Yes, this is the book.

(Notary will please mark this book "Plaintiff's Exhibit No. 4.)

30 Witness testified: "This William H. Stark Planting Book—marked Exhibit No. 4, gotten out by William H. Stark: I gave William H. Stark instructions not to make his name

prominent but to make Stark Bros. Nurseries & Orchards Co. prominent. I also directed him to submit the proof, the manuscript, before publishing.

Q. Did he do that?

A. He did not. As a matter of fact they had been sent to the printer, books returned, and were being mailed out when I stopped it."

Witness further testified: "We had a change made in that the name of William H. Stark was taken off the back of the cover, and a number of the books made up for immediate use. In these books on the inside of the back cover this request still remained 'Address letters for information to William H. Stark, Louisiana, Mo.' This is Exhibit 4, of which we mailed out a number of copies—later——

Q. You mean by 'we' the company?

A. Yes, a number were mailed out, but shortly afterwards we had a further change made. I wish to say that some of the No. 4 were mailed out by William H. Stark and not by the company. The later issue 'By Stark Bros. Nurseries & Orchards Co.' substituted for No. 4, and these were mailed out by the company."

The Planting Book with the changes made, as testified to by the witness, is introduced as plaintiff's Exhibit No. 5. Exhibit No. 5 has "Published by Stark Bros. Nurseries & Orchards Company" on the back, and No. 4 has "By William H. Stark" on the back.

Witness testified that some sixty thousand (60,000) of the Planting Books were published.

Witness identified plaintiff's Exhibit No. 6, as "Stark Year Book 1910" and referred to page 115 where there is mention of William P. Stark as follows: "We refer the reader to our special service department, which is in charge of men of long practical training and who in turn are under the personal supervision of our Mr. W. P. Stark. The service of this department is open to every one without charge of any character."

Witness identified plaintiff's Exhibit No. 7, as the Stark Year Book for 1911, and called attention to page 15 to the following: "Commercial orchardists will be interested in our co-operative plan for the commercial planting of Liveland Raspberry; full information will be sent on request, which should be addressed to Mr. W. P. Stark personally."

Witness identified plaintiff's Exhibit No. 8, as a publication published at St. Joseph, Missouri, known as "The Fruit Grower, and referred to page 4 thereof, advertising "Stark Trees" by the Stark Bros. Nurseries & Orchards Company, and, in this advertisement, advertising the Orchard Planting Book by William H. Stark, also the Orchard Cover Crops by William P. Stark."

31 Witness testified that the "Orchards Cover Crops" was gotten out by William P. Stark. Many thousands were sent out. It bore the following "Copyright 1910 by Stark Bros. Nurseries & Orchards Company." It was identified by the witness as plaintiff's Exhibit No. 9.

Witness testified that Exhibit No. 9, "Orchard Cover Crops" was

put out at the expense of the company and that he protested against the large number of these "Cover Crops" sent out in 1911.

Witness testified: "A general policy of our company had been not to unduly make any individual member's name prominent. There were special reasons why I did not wish W. P. to continue making his name prominent at that time. It opens up rather a long story. Briefly, in 1909, W. P. Stark tried to buy my interests which would have given him a controlling interest in the business. In 1910, shortly after the Judge (Eugene Stark) died, who was a large stockholder in our company, W. P. Stark submitted a proposition to me personally to join him in buying out the other two interests. There were four (4) Stark interests in the Stark Brothers Nurseries & Orchards Company. His proposition in brief was that he and I together should buy out the other two interests, Judge Eugene Stark's estate, and the Clarence M. Stark interests. Clarence M. Stark had broken down by overwork in 1903 and had since taken no active part in the conduct of the nursery business. I declined to entertain this proposition."

Witness testified: "That in 1911, W. P. Stark made demands for what he considered exorbitant salary, also demands for offices for himself, son, and son-in-law, Earl M. Wilson, who had come in the business in the fall of 1908. "His demands we considered unreasonable and W. P. Stark spoke of withdrawing from our business and going into business with himself, son, and son-in-law. On or about May 1st, 1911, these three men sent in their resignations to take effect at the end of our year—in June, 1911. When the election was held in 1911, W. P. Stark refused to participate in the proceedings, and thereupon his son and son-in-law withdrew from the business, their resignations having taken effect. On September 2nd, at our invitation, W. P. Stark returned and was re-elected to his old position at the old salary, as were also his son and son-in-law, and we made a fresh start."

Q. You referred to W. P. Stark going to see a man in the East with whom your company had had correspondence—who was this man?

A. Mr. J. H. Hale of South Glastonbury, Conn.

Q. What did your agent—Mr. W. P. Stark—go to see him about?

A. The securing of a valuable new peach. I notified W. P. Stark that the company could not be milked in that way, as I recall the words, and I objected to this arrangement, and so wrote Mr. Hale. This peach matter and other matters rendered it unwise in view of
W. P. Stark's statements often made about starting a new
32 nursery—I deemed it inadvisable to have him making his name unduly prominent at the company's expense.

Q. Finish up what the results of that visit were, and what the final conclusion was in the matter?

A. W. P. informed us that our company would have the preference in introducing the propagating this new peach. I wrote to Mr. Hale in regard to the matter, notifying him——

(By Mr. Pearson: We object; the letter is the best evidence.)

Q. Did your company finally get the peach as was promised by your employe or agent—W. P. Stark?

(By Mr. Pearson: We object under the pleadings, that it is absolutely immaterial in this case.)
(By Mr. Wilfley: I further object as it calls for a conclusion.)

A. Mr. Hale broke faith with our company. He had agreed that we would later get together and make a contract that would be fair to all interests. This promise was not kept. On the other hand, a contract, temporary in its nature, reduced to writing, however, and signed by Wm. P. Stark and J. H. Hale personally, although both of these men represented corporations—Wm. P. Stark representing our corporation, and Mr. J. H. Hale the Hale corporation—had signed contract, as I recall, early in September. Don't recall the date, but about September 11th. It later developed at the Mexico trial that a permanent agreement had been made between Mr. J. H. Hale and W. P. Stark in June, 1912, while W. P. Stark was still an officer of our company. I wish to state further that we received a large number of buds from Mr. Hale early in September, that we propagated some 50,000 buds in the nursery and propagated by the system known as "top-working" large trees in the orchard to this variety of J. H. Hale, which are now bearing trees in our test orchard at the nursery, which is part and parcel of our real estate at the home nursery.

Q. What was your understanding as to who had the right to the peach from Mr. W. P. Stark?

(By Mr. Pearson: We object because he has already testified that it was under a temporary contract and that contract is the best evidence of what——)

By Mr. Matson: We are not asking about the temporary contract between Mr. Hale and Mr. W. P. Stark, but what W. P. reported to you as president of the Stark Brothers Nurseries & Orchards Company.

A. He reported that we had the preference in the propagating and introduction of the J. H. Hale peach.

Witness testified that William H. Stark resigned April 12th, 1912; that he started a new nursery; that he was absent more or less in the latter part of 1911, and the early part of 1912 from "our nurseries" looking for and starting the new nursery, which was begun in 1912; that the company brought pressure to bear against W. H. Stark which was primarily the cause of his resignation;
33 that the nursery was started at a little village named "Chester, Missouri"; that the first advertising that came to "our notice" located this nursery at Chester with offices at Louisiana, Missouri.

Witness testified that this new nursery was established early in 1912, and that William P. Stark was with the plaintiff company until the latter part of June, 1912. The name of this new nursery was the "William Stark Nursery"; that "William Stark was the name of our father" and that he conducted a nursery at Louisiana, Missouri; that the "first Stark Nursery, according to our information, was about 1816, when Grandfather Stark started the original

orchard or nursery as a neighborhood concern. My understanding is that in 1825, it was being conducted on larger lines. In 1835, according to my understanding, my father participated in the nursery, succeeding or working with his father. Judge James Stark was my grandfather, who started the original orchard."

Counsel for defendants objected to the above and asked that it be stricken out because it was hearsay evidence and occurred long before the witness was born, which objection was overruled, and counsel for the defendant then and there duly excepted.

Witness testified: "In my father, William Stark's advertisements, he featured and advertised the nursery as having been established in 1835—the year, according to my understanding, he began his nursery activities. In later years our company went back to 1825 in dating the foundation of the nursery."

Q. You state above, Mr. Stark, that Wm. H. Stark started a nursery at Chester, Mo., with principal offices of the nursery at Louisiana, Mo., before he resigned from the plaintiff company—is that correct?

A. "I know the advertisement was out for the William Stark Nursery, but who got the advertisement out I do not know, personally."

Witness further testified: "As I recall, it was clearly developed at the Mexico trial that a permanent contract had been made for this J. H. Hale peach by and between W. H. Stark and W. P. Stark with J. H. Hale, for this peach; that contract bore date in June, 1912, at a date when W. P. Stark was an officer of our company. There were other matters that came out, I don't recall just at this moment, in regard to W. P. Stark backing the new company. I wish to say here that in November, 1911, Wm. H. Stark's father-in-law, with a Chicago lawyer, came to my house, claiming to be the agent and representative of W. P. Stark, and demanded—"

Counsel for defendants objected to any testimony concerning the conversation between William H. Stark's father-in-law and the Chicago lawyer, for the reason that it was not proved that they were the agents of William P. Stark, which objection having been overruled, counsel for defendants then and there duly excepted.

Witness testified that "They put up a buy or sell proposition with W. P. Stark. One or two days after this visit, which was November, 1911, as I recall, 1911—a telegram from Mr. Newhall to
34 W. P. Stark was sent in which W. P. Stark was advised to at once start his new nursery."

Counsel for defendants objected that it was irrelevant, incompetent and immaterial, as to what Mr. Newhall may have telegraphed, which objection having been overruled, counsel for defendants then and there duly excepted.

Telegram, plaintiff's Exhibit No. 10, was offered in evidence.

Counsel for defendants objected to this telegram being introduced in evidence, for the reason that it is not the original, and for the further reason that it is incompetent, irrelevant and immaterial to any issue disclosed by the pleadings in this case. That the telegram does not show any destination, or any time or place of de-

livery, and the telegram shows on its face that it does not bear the customary dates showing the receipt of the telegram at any telegraph office. That the telegram shows on its face that it isn't an original and it doesn't show that it was addressed to any particular place. The paper it is on might be gotten up by anbody at any time, any place, for any purpose; which objection having been overruled, counsel for defendants then and there duly excepted.

The telegram was marked "Plaintiff's Exhibit No. 10," and is as follows:

"Benton Harbor, Michigan, November 8th, 1911, to W. P. Stark, Special delivery received. Would follow Brown's advice absolutely until that arrives my own advice is stop all negotiations for settlement absolutely cancel option to buy your interest except at higher figures. Avoid all discussion and start another company, don't resign. Ben Newhall."

Witness testified that he heard Ben Newhall testify under oath that he sent the telegram to W. P. Stark; that the Mr. Brown referred to in the telegram was the attorney whom Newhall had brought to Louisiana with him to make the buy or sell proposition early in November, 1911.

Witness identified plaintiff's Exhibit No. 11 as the Stark Condensed Year Book for 1912.

Witness testified that this was gotten out by Earl M. Wilson under W. P. Stark's direction in the fall of 1912. W. P. Stark had instructions from witness not to make any individual's name prominent in this book, and that certain changes were made in the book, leaving out the names of William P. Stark and William H. Stark: "In the course of time I sent a man to Chicago to have the change made and those names were stricken out and the book was finally published." Witness testified that between 700,000 and 800,000 of these books were sent out.

Q. "Under what conditions, Mr. Stark, did W. P. Stark sever his connections finally and for good with the plaintiff company in an employ capacity?

A. He was not re-elected in 1912 for the advice reasons heretofore testified to, and for other reasons that appeared to us sufficient for not re-electing him.

35 Q. When he was re-elected as an employe, did he maintain any official capacity with the plaintiff company—in the nature of a director?

A. No; he was not re-elected as a director in 1912. He later was re-elected."

Witness further testified: "He resigned in 1911 and was not re-elected at the annual meeting of 1911; he did not participate and was not elected. We elected a temporary director and treasurer, then we re-elected him to his old position as treasurer and director September 2nd, 1911."

Q. "Mr. Stark, you state that in 1911, that the Wm. Stark Nurseries sent announcements broadcast that they were opening a new

nursery by the name of "William Stark Nursery" at Louisiana, Missouri?

A. That was issued in 1912—in June, 1912.

Q. Did this announcement have any effect on your business?

Counsel for defendants objected to this question for the reason that it calls for a conclusion, which objection having been overruled, counsel for defendants then and there duly excepted.

A. "A confusion of mail matters, after this announcement came out of the William Stark Nursery at Louisiana, Missouri."

Witness testified: "For a great many years our company has received innumerable letters with all kinds of different addresses, such as 'Stark' and 'Nursery,' and all kinds of combinations, some letters sent to New Orleans, Louisiana; some to St. Louis; some to St. Joseph, Mo. We have been in the habit for many years of getting here from many points, besides Louisiana, Mo., mail addressed in many divers ways, different combinations of 'Stark' and 'Nursery,' etc.

Witness testified that the plaintiff company received a large amount of mail; "our stamp bill is a big one, representing in the neighborhood of $20,000.00 per year, some years."

Witness testified that after this new William Stark Nursery had been started at Louisiana and a mix-up and confusion of mail resulted, "we made complaint at Washington for a ruling as to our rights in regard to the mail." Witness testified that the ruling was made in favor of plaintiff company and that "upon our return home we then received mail as formerly of the different combinations of "Stark" and "Nursery" coming to Louisiana, Missouri, and the ruling held that it was clearly an attempt on the part of the William Stark Nursery Company to get the mail of an old established nursery concern.

Witness testified that after the present ruling the William P. Stark Nursery moved to Chester, Missouri. Later they secured a change of the name of the Town of Chester to "Stark City, Mo."

Witness testified that the plaintiff company had established a nursery at Stark Missouri, and that it had carried the name "Stark, Mo." on its letterheads. He referred to a catalogue copyrighted in 1898 by Stark Brothers in which the Stark, Mo., branch
36 is listed, and also referred to a price list issued in 1899 with the Stark, Mo., branch listed. He referred to Starkdale post office, where plaintiff had established a branch plant and conducted a nursery for many years. Witness testified that this nursery farm was sold in 1907, but that the plaintiff continued leasing land, growing nursery stock, until 1911, and that the name "Starkdale" was carried in their advertisements. Witness referred to a publication called "World's Fair Fruits" issued in 1904, with Starkdale advertised in it. Witness referred to an advertisement of 1900 which contained various adds of Stark, Mo.

Witness then identified six books as plaintiff's Exhibits 12*a*, 12*b*, 12*c*, 12*d*, 12*e* and 12*f*.

Witness testified that mail came to plaintiff company, addressed "Starkdale, Mo.," "Stark, Mo.," and "Stark Station, Mo."

Witness identified plaintiff's Exhibit No. 13 as an envelope used in the Spring of 1912.

Witness testified that plaintiff company at various times had talked over the advisibility of changing the name of Louisiana. "We wanted a Stark City address, or a Stark address, so as to feature our name and get away from the name "Louisiana," which we thought hurt our advertising to a certain extent. We made efforts at various times to get a branch office at the nursery, particularly in the spring of 1911. W. P. Stark, W. H. Stark and myself talked and discussed this matter. We had some talk and correspondence with the railroad people, also officials, including Mr. Ganz, postmaster at Louisiana, about a change that would give us a Stark address, rather than Louisiana. At one time here—in 1910—I remember W. P. Stark drew up some petition here and started to circulate it, trying to get the name changed to "Champ Clark."

Witness identified plaintiff's Exhibit No. 14, as the William P. Stark Nurseries' catalogue for 1912, and referred to page 24 thereof and read in regard to the "Florence Crab" as follows: "The Florence Crab originated with the late Peter M. Gideon of Minnesota, and was secured for propagation by Wm. P. Stark twenty-six years ago" and further testified: "As a matter of fact it was not secured by Wm. P. Stark, but rather by the Stark Brothers Nursery Company."

(By Mr. Wilfly: "We object for the reason that it is incompetent, irrelevant and immaterial to any issue in this case. We also object to that portion of the catalogue being read into the question and also in the answer, for the reason that it is incompetent, irrelevant and immaterial, to any issue in the case, and not covered by the pleadings.")

A. "This Florence Crab was a valuable new variety introduced by our company. It was secured by Clarence M. Stark, who visited Minnesota in '96, as I recall, W. P. Stark accompanying him on his visit. Clarence M. Stark was our propagator and a man whose judg-
37 ment we relied on to introduce and take up new varieties of fruits. William P. Stark was the office manager at that time. We featured this variety for many years as one of our introductions, advertising it very extensively for many years past. This is from W. P. Stark's catalogue of 1912—page 24.

Q. I hand you here, Mr. Stark, Mr. W. P. Stark's catalogue for 1913 (Which the notary will please mark as Exhibit No. 15) and I ask you to testify from it.

A. The same allegation as you read from your question in the 1912 book in the preceding answer occurs in this book on page 55."

Witness identified plaintiff's Exhibit No. 16, as the William P. Stark Nurseries catalogue for 1914, and referred to page 75 for the same statement as set out above:

Witness identified plaintiff's Exhibit No. 17, as a copy of the "Country Gentleman" of January 17th, 1914, and calling attention to the following language in an advertisement of defendants: "The

name of 'Stark' has for nearly a century been associated with the nursery business of America, and for the last quarter of a century William P. Stark has made that name sort of a trade-mark for big things in nursery work."

Counsel for plaintiff objected to this testimony because witness is giving an unfair interpretation of what is contained in the advertisement. He read of what some third party said about W. P. Stark, and to make it intelligible the whole page ought to go in evidence; which objection having been overruled, defendants' counsel then and there duly excepted.

Witness identified plaintiff's Exhibit No. 18, as a label which is sent out by the defendants.

Witness identified the plaintiff's Exhibit No. 19, as a copy of a letter, written on the letterhead of the plaintiff company, by witness to defendants, dated March 11, 1914, as follows:

William P. Stark Nurseries, Neosho, Mo.:

Attention of Wm. P. Stark.

GENTLEMEN:

The literature and advertising matter that you have recently sent to the officials of this Company, concerning certain claims relative to Delicious Apple and other matters, misstate the facts and constitute unfair competition and are for infringements on the rights of Stark Bros. Nurseries & Orchards Company. We hereby notify you to discontinue the unfair competition and infringement on our rights.

Very truly yours,

STARK BROS. N. & O. CO.,
By E. W. STARK,
President.

Witness further testified that he received no reply to that letter.

38 Witness further testified: "The Wm. P. Stark's entire new nursery here was, we thought, an infringement upon our rights, unfair, not only the trademark of 'Stark Trees,' which we have used for many, many years, spending a great deal of money; the Delicious Apple for instance which my brother, Clarence M. Stark, had discovered up in Iowa, which we had signed a contract for—W. P. Stark had published in our catalogues and had written letters that we had this contract and had exclusive right to it, so his entire catalogue was an infringement on our rights; his using the name of 'Stark City' was unfair to our company. We had protested at Washington, and had made broad claims to the right to the Stark name as applied to the nursery business through long years of use, had made application that we might continue to receive mail as in the past, any combination of Stark, no matter where sent, and even claimed the use that W. P. Stark had made of his own name while with our company, was equivalent to giving or selling us his own name in a controversy in August, 1912."

Witness testified that they had written other letters but did not have carbons of them. He testified that he did not recall any conversation in which he made a personal protest.

Witness identified plaintiff's Exhibit No. 20, as the "Country Gentlemen" of January 9th, 1915, and called attention to pages 54 and 55, and advertisement of the William P. Stark Nurseries, in answer to the question as to whether the bill of complaint contained the allegation that William P. Stark's advertisements carried this statement, "Wm. P. Stark's many friends, who have been in touch with him for thirty years, will please write for the 1915 Year Book."

Witness testified that the Country Gentleman had a large circulation.

Q. "Mr. Stark, your company alleges in its bill of complaint that the Stark Company has built up at great labor and expense an organization of about five thousand resident salesmen, locally known by the public as 'tree agents,' who designate their wares as plaintiff's trade-mark 'Stark Trees,' and that Wm. P. Stark Nurseries advertised broadcast 'Don't be misled by fakers claiming to be our agents,' and they circulated in form letters the statement 'We have heard of a man in your vicinity who claims to be our agent or salesman. He is a fake'; and that this sort of advertising caused the Stark Company to lose not only many old customers, but a number of agents who believed that the Stark Company maintained a secret mail order branch at Stark City to the detriment of the salesmen. Upon what, Mr. Stark, did you base that part of the allegation that refers to the statement, 'Do not be misled by fakers claiming to be our agent' and the statement 'we have heard of a man in your vicinity who claims to be our agent—he is a fake'?

A. By a form letter, a number of which came to our notice.

Q. Form letter of whom?

39 A. Of the William P. Stark Nurseries, dated Stark City, Missouri, January 12th, 1916, signed William P. Stark."

Witness identified plaintiff's Exhibit No. 21, and offered the same in evidence. Counsel for defendants objected to the introduction of this letter as an exhibit for the reason that it shows on its face that it has no reference to any trademark, registered or otherwise; for the further reason that the witness has already stated that the Hale Peach referred to in this exhibit was controlled by W. P. Stark, through a contract between him and J. H. Hale, and therefore the letter is incompetent, irrelevant and immaterial as to any issue raised by the pleadings in this case; which objection having been overruled by the court, counsel for defendants then and there excepted.

Witness identified plaintiff's Exhibit No. 22, which is an advertisement published in the Kansas City Star of November 3rd, 1915, by the defendants in which the following language is quoted by the witness: "Look out for agents claiming to represent us. They are frauds. Cut out the waste—buy direct, save money, get better trees. It is easy to remember our address—the town is named after our nurseries."

Counsel for defendants objected to this exhibit for the reason that it is incompetent, irrelevant and immaterial; which objection being overruled, counsel for defendants then and there duly excepted.

It was agreed that no further objection would be raised to Exhibit No. 22, by reason of the fact that the entire paper was not introduced in evidence.

Witness identified plaintiff's Exhibit No. 23, plaintiff's advertisement in the January, 1912, Fruit Grower, and referred to that part of the advertisement giving the address 110 Stark Station in conjunction with Louisiana, Missouri. Witness testified that there were similar advertisements in this and other papers.

Q. "I hand you here an advertisement dated January, 1912, of the Fruit Grower, St. Joseph, Mo., on page 8: Please state—and call your attention to an address in that advertisement—will you please state what address you find there?

(By Mr. Pearson: We object because the advertisement is the best evidence of any address found in the book.)

A. I find in the January issue—1912, Fruit Grower, our company's address given as follows: 110 Stark Station, in conjunction with Louisiana, Missouri. The two addresses appearing under our address.

Q. About what size type does this Stark Station appear?

A. In large size black type. Our company received many letters so addressed.

(Notary will please mark this advertisement to which witness has just referred as 'Plaintiff's Exhibit No. 23.')

Q. Mr. Stark, you say that was under the date of January issue, 1912. Was W. P. Stark then in your employ?

A. He was.

40 Q. Do you know for a fact that W. P. Stark had charge of the advertising of your company for this particular date?

A. He was our general manager and had general supervision of all our advertising, he and his son-in-law, Mr. Wilson, having gotten out and caused these advertisements to be made throughout the country. And especially in this Fruit Grower ad.

Q. Mr. Stark, is this advertisement, marked Exhibit No. 23, the only advertisement of this nature that has come to your notice.

A. We have many similar advertisements in this paper and others.

(By Mr. Pearson: We object to the answer and move that it be stricken out because it is indefinite, uncertain and not responsive to the question.)

Q. Upon what, Mr. Stark, do you base that allegation?

A. I have seen such advertisements in which Stark Station is given."

Witness identified plaintiff's Exhibit No. 24, the February, 1912, issue of Fruit Grower, in which Stark Station is advertised.

Witness testified that the plaintiff company had for a number of years maintained a large force of salesmen, many of whom worked practically all of the time, some portion for a time only; that these salesmen resided in Missouri, Illinois, and a number of other States, principally the so-called corn States, although many of them solicited and sent business in from many eastern and western States; that these tree agents are employed on a commission and discount basis. The shipments are twice a year—fall and spring. These salesmen distribute the literature for the plaintiff company. Witness testified that plaintiff company had lost a number of their salesmen, who gave as their excuse for leaving that the advertisements of William P. Stark, in which they were called "Fakers," interfered with their usefulness and cut off more or less orders they were in the habit of getting. These salesmen are mostly resident salesmen.

Witness testified: "Briefly, from 1893 to this time I have personally seen thousands of orders that had been sent in by our salesmen, from many States, Illinois, Indiana, and other States, which I have seen filled and boxed and tagged without trademark Stark Trees nailed on the box, the boxes addressed and shipped to ourselves—Stark Bros. N. & O. Co., to Illinois and many other States, twice a year. Throughout all these years since 1893, these trees are shipped direct to our salesmen in these different States, or to resident merchants, who act as collectors; these trees have been delivered to buyers, surplus trees, or trees not called for by the people who ordered them, have been sold, twice a year in many States, throughout this country, each year since 1893 to date."

Q. "Have you any definite knowledge that trees have been sold by agents out of the original boxes marked with the identifying trade-mark Stark Trees?

A. I have.

Q. Then you mean to say by that, that some of your agents, after receiving a box of different varieties (identifying the
41 box by the trade-mark Stark Trees) are retailed out of the box to different buyers?

(By Mr. Wilfley: We object to the form of the question. It is leading.)

A. All through these years, since 1893 to this time, trees have been sold from our boxes on which this trade-mark was carried.

Q. Sold to whom?

A. To sundry and divers persons.

Q. By whom?

A. By our salesmen and collectors throughout the various States.

Q. Out of what boxes?

A. Out of boxes in which our trees had been shipped to various States and marked Stark Trees.

Witness identified plaintiff's Exhibit No. 25, as an issue of the Fruit Grower of December, 1908.

Counsel for defendants object to this exhibit for the reason that it appeared to be a mutilated sheet, which objection having been overruled, counsel for defendants then and there excepted.

Witness identified plaintiff's Exhibit No. 26, as an issue of the Fruit Grower of January, 1913, and called attention to an advertisement of the plaintiff Company, containing the trademark "Stark Trees."

Witness identified plaintiff's Exhibit No. 27, as an issue of the Fruit Grower of February, 1913, containing an advertisement of the plaintiff Company with the trade-mark "Stark Trees" similar in design to Exhibit No. 1.

Witness was asked the approximate circulation of the Fruit Grower. He answered, "From hundred to hundred and twenty-five thousand per month is what we are charged for. In estimates and other proofs made to us here they have conclusively convinced us that they had a large circulation, running over a hundred thousand issues per month.

Witness identified plaintiff's Exhibit No. 28, which is a carbon copy of a letter signed "Andred B. Remick," dated August 26th, 19" addressed to William P. Stark Nurseries, Neosho, Missouri. It was admitted that this was a copy of a letter received by William P. Stark on or about the 4th day of September, 1916.

Witness testified as to a controversy between plaintiff Company and the defendant Company over the Delicious Apple, and identified plaintiff's Exhibit No. 29, as the certificate of registration No. 44437 of the trade-mark "Delicious." "Briefly, the Delicious Apple was brought to the notice of our Company in 1894 or '96. Our brother, C. M. Stark, later visited Mr. Hense Hiatt, who owned the original Delicious tree near Des Moines, Iowa, and made an exclusive contract for this Delicious apple. We proceeded to propagate and advertise the Delicious apple; our advertising since the late nineties has been largely advertising the great merits of this apple, as well as the merits of Stark trees. Approximately, in recent years, our Company has expended three-quarter million dollars in catalogue, newspaper and various forms of advertising, the key note for
42 many years past has been the Delicious Apple and Stark trees. We trade-marked this apple years ago; don't recall the exact date. I have here from the U. S. Patent Office, No. 44,437, Certificate of Registration of trademark registered July 4th, 1915.

Q. The registration is for your Company?

A. It was registered by our Company, signed by Stark Bros. Nurseries & Orchards Company, by W. P. Stark, Treasurer; subscribed and sworn to before Notary Robert H. Williams, by W. P. Stark.

(Notary is requested to mark this trademark Certificate of Registration No. 44,437 of the trademark Delicious, as "Plaintiff's Exhibit No. 29.")

Q. Mr. Stark, is this W. P. Stark, who signs as treasurer of the Stark Bros. Co. in the certificate identified by the above Exhibit No. 29, the principal defendant in this suit?

A. He is.

Q. Prior to 1912, did you make any reference to your ownership of this trademark and of a contract referred to in your above answer, and if any, what were they.

A. We advertised it in our catalogues; also newspapers, in a book called "The Apple Stark Delicious" gotten out in 1909 by Mr. Wilson, under W. P. Stark's general supervision. A large issue of this book.

Q. Was what?

A. This was published in 1909.

Q. By whom?

A. By the Stark Bros. Nurseries & Orchards Company.

(Notary will please mark this 1909 book—"The Apple Stark Delicious" as "Plaintiff's Exhibit No. 30.")

Witness called attention to page 43 of Exhibit No. 30, as follows: "Its propagation and introduction by us began in 1895, at which time we purchased the variety and sold right to its propagation. This refers to the apple commonly known as the Stark Delicious."

Witness called attention to the following from plaintiff's condensed year book for 1912, page 11: "In 1911 we undertook the propagation and introduction of the Delicious. Mr. Hiatt wrote us, giving a description and history of the original tree, which we reprint since it is representative of the tree as it is grown in all parts of the country." Witness introduced this as Exhibit No. 31, but it is the same year book as has heretofore been marked Exhibit No. 11. Witness testified "This book was gotten out by Mr. Wilson under the general supervision of W. P. Stark, while both were in our Company's employ."

Witness testified that plaintiff Company had a contract for the Delicious which he was unable to produce, because he stated it had been lost, misplaced or taken from the files. He testified that the contract gave the plaintiff Company exclusive right to the scions from this new tree, exclusive right to name the apple and to propagate it, from Mr. Jesse Hiatt, the owner, dated 1895 to the
43 best of the knowledge and belief of the witness. Witness testified that he had no copy of the contract.

Witness identified plaintiff's Exhibit No. 32, an issue of the Rural New Yorker of January 10th, 1914, and referred to pages 48 and 49, a two-page advertisement of the William P. Stark Nurseries.

Counsel for defendants objected to the introduction of this exhibit, for the reason that it is incompetent, irrelevant and immaterial to any issue in the case, which objection having been overruled, plaintiff then and there excepted.

Witness testified that the Rural New Yorker was one of the oldest horticultural publications in the country; that he has read it for

many years; that the plaintiff Company pays large sums for advertising therein at high rates, based upon the circulation, but that of his own knowledge he did not know its circulation, but did know that it had a large circulation.

Witness identified plaintiff's Exhibit No. 33, which is defendants' catalogue for 1913, and is the same as plaintiff's Exhibit No. 13. Witness referred to pages 12, 13 and 14 of this exhibit for certain statements concerning the Delicious apple set forth on said pages.

A. "On page 14 of this catalogue, 1913 catalogue, is the following: 'Two or three years after this two barrels were shipped to William P. Stark, who was ever upon the look out for something meritorious, and immediately recognizing their superiority commenced negotiations for their propagation. Only for William P. Stark the Delicious apple might never have been known. It was William P. Stark who came to the rescue, saved the apple and gave it to the pomological world, and through him my father's wish was gratified.' The above has reference to the Delicious apple in a statement signed by S. L. Hiatt.

(By Mr. Pearson: We object to the excerpt just read by the witness because it is not a full statement of all that is said and contained in said exhibit; the matter that the witness read was just a portion of a letter that was written by S. L. Hiatt and to have been perfectly fair the witness should have read the whole letter and not a mere part of it. The portion that was read was not said by William P. Stark but was said by the owner of the Delicious apple concerning William P. Stark.)

(By Mr. Matson: Even though that may be true, still it is published by Mr. W. P Stark and sent out by W. P. Stark as being true and he knew at the time that it was not true.)

(By Mr. Wilfley: We object to the latter part of Mr. Matson's statement because he knew at the time it was true and Mr. Hiatt knew it was true.)

(By Mr. Matson: Mr. Hiatt made so many statements about the matter that it might prove contrary——)

(By Mr. Pearson: The witness was reading from this statement and he certainly vouched for the truth of the matter.)

44 Witness refers to a label in said Exhibit No. 33, which is the same exhibit as No. 15, and this is the same label described in the bill of complaint, in the allegation for infringement of plaintiff's trademark, Exhibit No. 1.

Q. Mr. Stark, this Exhibit No. 33 is Wm. P. Stark's catalogue published in the year of 1913—how old were the Wm. P. Stark Nurseries at that time?

A. The Wm. P. Stark Nurseries were started in the spring of 1912; that is, his first planting was done in the spring of '12. When this catalogue was published in 1913 his trees could not have been quite one year old.

(By Mr. Wilfley: We object to that answer as not responsive to the question and as a dissertation on W. P. Stark's trees, when there is no evidence here that W. P. Stark represented that he was selling any trees which he had propagated since the Wm. P. Stark Nursery Company had begun business, because it shows further, that the delicious apple trees at that time were being propagated by various nurseries all over the United States, and were being advertised by numerous nurseries throughout the United States.)

(Counsel for plaintiff wishes to know how counsel for defendant knows all these facts?)

(By Mr. Wilfley: I can prove it by your own witness when we get to cross examination.)

Q. Mr. Stark, while looking over Exhibit #33, do you find anything further that in any way infringes the trademark rights of your company, and if any, please state what they are.

(By Mr. Wilfley: We object to the form of that question. It calls for a conclusion, assumes there is an infringement, and the contents of the book is the best evidence.)

A. I find on the title page of W. P. Stark's catalogue 1913, the picture of a tree with the word "Stark" in large black letters printed over the tree. I furthermore find this same picture of a tree with the word "Stark" printed thereon on page 4 and on succeeding pages up to and including 112.

Q. On the back cover is it?

A. On these 108 pages occur this tree with the word "Stark" over the name thereon.

Q. Is it also on the cover and back?

A. Upon the front page; also back cover is a picture of a tree with the word "Stark" printed on top of same, or over the tree.

(By Mr. Pearson: We object to the answer and ask that it be stricken out because the witness is not stating all that is contained in connection with Stark trees because right under it and close to it in very large letters is "Stark City, Mo." plainly designating the nursery is not in any way connected with that of the plaintiff company's nursery at Louisiana, Missouri, and in stating what is on those pages, in fairness to the defendant, he should have stated that Stark City, Missouri, is in connection therewith.)

45 (By Mr. Wilfley: And in each and every instance the words "William P." precede the word "Stark" and the word "Nurseries" follow it.)

(By Mr. Remick: This part of the controversy as to whether or not the conspicuously written word "Stark" as exhibit shows, used over the picture tree, is or is not an infringement of plaintiff's registered trade mark Stark Trees will be determined at the proper time and before the proper court.

Q. Getting back to the delicious matter, Mr. Stark, what effect, if any, did the confusing use of the name "Delicious" by your old com-

pany and the Wm. P. Stark Nurseries have on your business, and on the public.

(By Mr. Wilfley: We object to that; it is clearly calling for a conclusion; it is incompetent, irrelevant and immaterial and an improper method of interrogating witness.)

(By Mr. Remick: I explicitly claim that it is entirely relevant to show that confusion was caused by misleading or apparently misleading use of the Stark trade-mark.)

(By Mr. Matson: Who the owner of the genuine delicious apple and delicious apple tree——)

(By Mr. Pearson: We object to comments of the plaintiff's attorneys because they should be presented to the court at the time these matters are presented to them.)

A. The publication of Wm. P. Stark's catalogue and advertisements regarding the delicious apple and W. P. Stark's reference to his contract—exclusive contract, for the original tree, was harmful to our business, confusing to the public. Our company had been advertising for many years an exclusive contract to the original tree and had made delicious apple the keynote in a large amount of advertising for a number of years back. We had propagated delicious trees by the millions and sold them throughout this country and in other countries.

Witness identified plaintiff's Exhibit No. 34, which is an agreement between plaintiff and defendant, made the 16th day of October, 1914, at Kansas City, Missouri, and since it is referred to a number of times in witness' deposition, it is set out in full as follows:

Agreement.

"This agreement, made and entered into this the 16th day of October, 1914, by and between W. P. Stark, William H. Stark, of Neosho, Missouri, and W. P. Stark Nurseries Company, parties of the first part, and Stark Brothers Nurseries & Orchards Company, of Louisiana, Missouri, party of the second part,

Witnesseth:

Whereas, W. P. Stark has filed suit for the appointment of a receiver of the Stark Brothers Nurseries & Orchards Company; and,

46 Whereas, the Stark Brothers Nurseries & Orchards Company has filed suit against W. P. Stark on a certain promissory note for nine thousand dollars ($9,000.00) *dollars;* and,

Whereas, W. P. Stark has filed a counterclaim to said last mentioned suit for dividends on preferred stock of the Stark Brothers Nurseries & Orchards Company held by him, and other counterclaims; and,

Whereas, there is outstanding a certain contract between Stark Brothers Nurseries & Orchards Company and W. P. Stark with reference to a tract of land known as the Rolla Farm, and situated near Rolla, Missouri, and,

Whereas, certain partition suits have been filed for the partition of certain lands in Pike County, Missouri, known as the McQuie farm; and,

Whereas, W. P. Stark has a certain contract with one S. L. Hiatt, with reference to the original Delicious Apple Tree; and,

Whereas, W. P. Stark is indebted to Stark Brothers Nurseries & Orchards Company on open account; and,

Whereas, the Stark Brothers Nurseries & Orchards Company has not declared any dividends on its preferred stock since July, 1912:

Now, Therefore, in consideration of the premises and the mutual covenants and agreements hereinafter contained to be kept and performed by the parties hereto, and for the purpose of adjusting the above mentioned law suits, it is hereby agreed by and between the parties hereto as follows, to wit:

1. W. R. Stark agrees to dismiss the suit against Stark Brothers Nurseries & Orchards Company for the appointment of a receiver and to pay the court costs in connection with the same.

2. W. P. Stark agrees to pay the balance due on the note that is now in litigation in the Circuit Court at Joplin, Missouri, and to pay the costs in connection with said suit and to dismiss the counterclaim filed in said suit and to release the claims on account thereof.

3. The Stark Brothers Nurseries & Orchards Company agrees to pay ninety-four hundred dollars ($9,400.00) for the McQuie Farm, and to pay all costs in connection with the partition suits filed for the partition of said tract of land, and W. P. Stark is to receive one-third (1-3) of the ninety-four hundred ($9,400.00) dollars purchase price upon delivery by him of a deed conveying his interest in said farm. It is understood that no attorney fees are to be taxed as costs in this case, and that the Stark Brothers Nurseries & Orchards Company is not to pay any claim on account of attorney's fees in connection with either of the partition suits filed in connection with this land, and that the other defendants in said partition suits are not to pay any attorney's fees that might be taxed as costs in said suit of William P. Stark vs. E. W. Stark et al.

47 4. W. P. Stark agrees, in connection with all other stockholders who hold one hundred (100) shares or more of stock in the Stark Brothers Nurseries & Orchards Company, to take all necessary steps to reduce the capital stock of said company so that the preferred stock will be five thousand (5,000) shares of one hundred ($100.00) dollars each, as it stands at present, and the common stock shall be twenty-five hundred (2,500) shares of one hundred ($100.00) dollars each, or such other amount as may be agreed upon.

5. W. P. Stark agrees not to bring any suits of any nature against the company or the officials of the company for acts done by the company or the officials to this date.

6. In making this agreement, it is understood and agreed that W. P. Stark is acting for himself and for any one who holds any of his stock as collateral security, insofar as his stock is concerned, and also

for members of his family, including his son-in-law and his son and daughters and wife, and he guarantees that these parties will comply with this agreement.

7. The parties of the first part agree hereafter not to make any reference in any of their advertisements or literature of any nature to the contract between W. P. Stark and S. L. Hiatt, covering the original Delicious Apple Tree, or any reference claiming the ownership of said original tree, or any reference to the discovery of said original apple tree. This does not apply to literature that is already published.

8. The Stark Brothers Nurseries & Orchards Company is to declare forthwith a dividend of $60,000.00 on the preferred stock of said company, and is to declare a further dividend of $15,000.00 on the preferred stock of said company payable December 31st, 1914, said dividends to be declared at a meeting of the Board of Directors of said company to be held within ten days from this date. That part of the $60,000.00 which is due on the preferred stock of the Stark Brothers Nurseries & Orchards Company owned by W. P. Stark, is to be applied as hereinafter provided. That part of the $15,000.00 dividend, payable December 31st, 1914, which is due on the preferred stock owned by W. P. Stark is to be credited on December 31st, 1914, as hereinafter provided. Any dividends on stock which W. P. Stark has sold, which may be due him, are to be credited in the same manner as the other dividends due him hereunder.

W. P. Stark hereby agrees to indemnify the company against any claim for dividends by the present owners of any stock which has been sold by him and upon which dividends would be allowed to him under this agreement; and said W. P. Stark guarantees that he is entitled to dividends upon at least twelve hundred fifty (1,250) shares of the preferred stock of said Stark Brothers Nurseries & Orchards Company, and will be so entitled at the time said dividends are declared.

9. Out of the dividends due and payable to W. P. Stark, as hereinabove provided, there shall be applied by the company to
48 cover the following indebtedness, the following amounts: Note $9,000.00; interest on note in suit at Joplin, Missouri, $1,256.25; open account $838.06; Rolla farm $10,000.00: Total $21,094.31; which said amount is due by said William P. Stark on this date to said Stark Brothers Nurseries & Orchards Company, and represents all moneys now due said company from said William P. Stark.

10. In addition to the dividends which are to be credited as hereinabove provided, and the $3,133.33 from the McQuie Farm, there is also to be credited to W. P. Stark, $153.84 on joint account.

11. Stark Brothers Nurseries & Orchards Company is to convey by warranty deed to W. P. Stark, the Rolla farm, and William P. Stark is to surrender to the Stark Brothers Nurseries & Orchards Company

all of the securities and collateral referred to in the Rolla farm contract, together with any proceeds of any of said securities that have heretofore been paid said Stark Brothers Nurseries & Orchards Company.

12. W. P. Stark agrees to attend the meeting of the Board of Directors of the Stark Brothers Nurseries & Orchards Company to be held at Louisiana, Missouri, within the next ten days, and to vote for the resolution authorizing the dividends upon the preferred stock, which resolution is to be so drawn as to suit the convenience of the company with reference to the payment of said dividends, except nothing therein shall affect the provisions of this contract.

13. At the time of declaring the dividends herein provided, all of the rest of the agreements herein referred to shall be complied with.

In witness whereof, the parties hereto have hereunto set their hands and seals, this 16th day of October, 1914."

Witness identified plaintiff's Exhibit, No. 35, the January, 1917, issue of "Better Fruit" and referred to a full page advertisement of the defendants therein, wherein the following language is used: "William P. Stark was the first to recognize the merits of this great apple. He named it "The Delicious" and had the foresight and courage to propagate it and to urge growers to plant it."

Witness testified that "Better Fruit" is a well known horticultural paper, published and distributed throughout the northwest with a large circulation.

Witness testified: "Mail order sales for the fiscal year ending May 31, 1909, in the Mail Order department of plaintiff company, were $174,863.05; May 31, 1910, sales in the Mail Order department were $314,718.98: May 31, 1911, sales in the Mail Order department were $360,887.10, and for the year ending May 31, 1912, the sales in the Mail Order department amounted to $243,081.80; that the total for the said four (4) years—1909 to 1912, inclusive, was $1,093,550.93.

49 Mail order sales of the plaintiff company for the year ending May 31, 1913, were $182,859.81; for the year ending May 31, 1914, same were $192,355.34; for the year ending May 31, 1915, the same were $150,985.69, and for the year ending May 31, 1916, the mail order sales were $180,001.78; a total for the four years, 1913 to 1916, inclusive, of $706,202.62.

Witness testified that the sales made by salesmen for a like period are as follows:

For the year ending May 31, 1909, sales were $470,753.95; for the year ending May 31, 1910, the sales were $341,744.70; for the year ending May 31, 1911, the sales were $362,116.40; for the year ending May 31, 1912, the sales were $333,552.00; a total for the four years, 1909 to 1912, of $1,508,167.05. For the year ending May 31st, 1913, the sales were $323,490.65; for the year ending May 31st, 1914, the sales were $432,514.50; for the year ending May 31st, 1915, the sales were $465,410.10; for the year ending May 31st, 1916, the sales

were $384,388.50; a total for the four years, 1913, to 1916, of $1,605,803.75.

Witness testified that these sales covered business in every State in the Union and some foreign countries.

Witness identified plaintiff's Exhibit No. 36, which is one of plaintiff's tags with the trade-mark "Stark Trees" thereon, bearing date of 1898, used to attach to the different orders of trees prior to being baled or boxed, as the case may be. Witness testified that this tag was in addition to the stencil or card bearing "Stark Trees," plaintiff's Exhibit No. 1.

Witness identified plaintiff's Exhibit No. 37, which is a tin label and has the two words "Stark Trees" in the form of a trademark.

Witness identified plaintiff's Exhibit No. 38, which is a paper label having the words "Stark Trees" on it.

Witness testified that Exhibits Nos. 36, 37 and 38 are practically the same as Exhibit No. 1.

Witness identified plaintiff's Exhibit No. 39, an issue of Country Gentleman of January 29, 1916, containing a full page advertisement of the defendant, William P. Stark Nurseries. In this advertisement is a label—a fac-simile of a label used by the William P. Stark Nurseries containing the picture of a tree thereon with the word "Stark" printed on top of the tree, or over the tree.

Witness identified plaintiff's Exhibit No. 40, which is a full page advertisement of the plaintiff company in the July, 1910, issue of "The Fruit Grower."

Q. You will please read from this advertisement:

A. This advertisement——

(By Mr. Wilfley: We object to the reading from the advertisement; let's see it first.)

Q. Please read from it:

(By Mr. Wilfley: We object to that as being incompetent, irrelevant and immaterial to the issue in this case.)

50 A. This is a full page advertisement gotten out by our company, by Mr. Wilson, under the supervision of W. P. Stark, while these two men were in our employ and in charge of the advertising department. This full page advertisement was published in the July issue, 1910, Fruit Grower, quoting from this advertisement "As sterling is to silver so is Stark to trees"—all of the above words being in large print and underscored. "When buying silver you are careful—you want good silver because you are going to pay a good price for it; so you can look for the word 'Sterling' stamped upon it. You absolutely know that Sterling silver is good silver. Are you as careful when buying fruit trees for your orchard—the trees on which you are probably going to depend for your livelihood? You should be. Trees cannot be stamped with an imprint as can silver, but if you buy Stark trees, you are just as sure of Sterling quality as the silver buyer is of his silver. For more than three-quarters of a century the word 'Stark' has stood for all that is good in

nursery stock. Tree planters the world over have come to regard the word 'Stark' as synonymous with 'Quality' in trees—more than that, with Sterling quality trees."

It was agreed by counsel that that page might be torn from the book and that no objection would be offered on the ground that the rest of the book was not there.

On cross-examination, E. W. Stark, president of the plaintiff corporation, testified that the nursery business had been his (witness') lifelong business, as well as that of defendant, William P. Stark, and that the witness and William P. Stark and Clarence M. Stark took over the business of their father after his death; that William P. Stark had lived in Louisiana from his birth up until 1913, and had always been actively connected with the plaintiff company; that William P. Stark owned practically 30 per cent of the stock of the plaintiff corporation at the date the deposition was given, and that the witness owned practically 30 per cent, and that the heirs of Clarence M. Stark, deceased, owned practically 30 per cent.

Witness testified that William P. Stark was in general charge of the business and devoted all of his time to the business up until 1912; that he was a hard worker; that he pushed the business with great energy and enthusiasm; that while W. P. Stark was in charge of the business he was very active, attended conventions and horticultural societies and made addresses on various occasions on which the nurserymen were assembled. The witness thought it was to the best interest of the company to have representatives at these various horticultural conventions, and that the book "Cover Crops," plaintiff's Exhibit No. 9, was a paper read at a horticultural meeting by defendant, William P. Stark, at Columbia, Missouri.

Witness testified that the trademark "Stark Trees Bear Fruit," with the picture of a bear, was used extensively in advertising plaintiff company, and that it had been used for a great many years; that the Exhibit No. 1 containing the words "Stark Tree," was put on boxes.

51 Q. These boxes remained in your packing houses until they were ready to be shipped out to the various purchasers?

A. Yes. Sometimes they are made up several weeks, sometimes several months ahead of trees being put in them. These boxes are sometimes stenciled with trademark in place of having cards tacked to them. We use both stencil and card.

Q. These boxes are also used to ship trees to various purchasers throughout the country?

A. That is true. Used on practically all of our shipments since 1893.

Q. You spoke in your direct examination of a special design of those words "Stark Trees." That special design has always been of a form as shown in your Exhibit No. 1; that is, the letter "S" is larger than "T" and the "T" is larger than "A" and the letters diminish down to "K," and in the word "Trees" the letter "T" is smaller than "R" and the letters increase up to "S" in size—is that right?

A. That is right.

Q. That is what you meant by a special design, is it, Mr. Stark?

A. Yes.

Q. And that design was always used?

A. That is the design we have been using all of these years.

Q. That is, letters arranged in that particular way?

A. As you have described them; they have varied somewhat as we have used different sized cards—the card which goes upon our cars is much larger, but the same general design with a larger "S" and diminishing letters down to "K."

Witness testified, with reference to the six car load of trees sold in Washington, as follows:

Q. "Did you go with those cars?"

A. I started after the cars left here and saw them transferred at Spokane.

Q. Do you recall how many cars there were?

A. Six, as I recall, in the first shipment that I was with, and I believe one later.

Q. How many agents did you have out in Washington at that time?

A. The bulk of these trees had been sold by one general agent, who had more or less assistants.

Q. Who was he?"

A. A man by the name of Gilbert.

Witness testified that his nephew, Lloyd C. Stark came with the company in 1911. That he had theretofore attended school at Annapolis and had been in the navy; that the time he was in school and in the navy was about eight years, during which time he had had no direct connection with the plaintiff company, and that he practically succeeded William P. Stark in the company.

Witness testified that the company had two departments—the mail order department and the salesman department; that "our mail order varied with conditions from year to year. It was a question of advertising. When we had a surplus of stock we were heavy advertisers and sold more or less through the mail order department. Sales in that department paralleled the amount of advertising."

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Witness stated that during 1909-1910-1911, when the mail order business was so large, W. P. Stark and his son-in-law, Earl M. Wilson, were in charge of the advertising department.

Witness stated that he knew that William H. Stark was in charge of getting up the planting book, plaintiff's Exhibit No. 5. Witness testified that plaintiff's Exhibit 6 and plaintiff's Exhibit 7, which are the Stark Bros. Nurseries & Orchards Company's catalogues for 1910 and 1911, were gotten out under the general supervision of W. P. Stark, acting as general office manager, and that his son-in-law, Earl M. Wilson, had special charge, and that these catalogues were the most elaborate and most expensive of any ever gotten out by the Company, and that these two books were sent out through the mails during the years when the mail order sales were the largest in the history of the Stark Bros. Nurseries & Orchards Company.

Witness testified: "My belief is that the catalogues have no great influence on the amount of sales made through salesmen, from the

fact that the recipients of catalogues usually order direct, whereas the salesman often sells through personal solicitation."

Witness testified that in the eight years from 1903 to 1911, inclusive, 1911 was the year of the largest sales.

Witness testified that he insisted that the plaintiff company adopt a cheaper form of year book than plaintiff's Exhibits 6 and 7, and that as a result plaintiff's Exhibit No. 11 was issued for the Condensed Year Book for 1912.

Q. "As a matter of fact since you have been cutting down on the expense and getting out cheaper catalogues your mail order department has been falling off?

A. There has been a falling off in the mail order department in the last four years, but I do not attribute it to our catalogues or our advertising.

Q. Now, Mr. Stark, you state that you objected to these catalogues—plaintiff's Exhibits Nos. 6 and 7 on account of the expense to the company in getting them out and sending the out. Was that the occasion for the friction in your company which you referred to in your direct examination?

A. It was not. In talking over those catalogues my judgment was that they were too expensive for general circulation, but in my opinion it was advisable to have a catalogue not so heavy, not quite so expensive, for general circulation. Those only went, as I recall to 100,000 people in 1910, and about 75,000 people in 1911, whereas our general mailing list runs about 750,000 to 800,000."

Witness testified that "Up to and including 1908 our people had a great amount of difference of opinion, some friction, nothing serious, up to and including 1908. W. P. Stark's son-in-law came in in the fall of 1908, friction gradually grew after he was put in charge
53 of the advertising department. Judge Stark died in due time, Clarence Stark being out, and friction did grow to a certain extent, more than in previous years."

Witness testified as to a proposition of "buy or sell" but that nothing resulted from it; that there had been some friction by reason of the witness intercepting a check in 1911, signed by Stark Bros. N. & O. Co., Wm. P. Stark, Treasurer, but these things were smoothed out "at a conference with our banker in St. Louis." But the differences and friction would crop out at various times from September 2, 1911, up to June, 1912, when W. P. Stark was not re-elected again.

Witness testified with reference to a receivership suit brought by William P. Stark against the company, and other suits, all of which were adjusted in the Kansas City contract, plaintiff's Exhibit No. 34.

Witness testified that the plaintiff company did not have a regular office at Stark, Mo.; that they had a plant at Starkdale, where a man was in charge; that they "got some mail there, but as a rule mail was sent here, except such matters that came in his department that he could handle."

Witness testified that there never was a post office at Stark Station, that they had tried to get a branch office there but had failed.

Witness testified that he knew that the William P. Stark Nurseries were located at Neosho and Stark City; that to the best of his knowledge and belief there is no office at Stark City, but that the offices are at Neosho.

Q. "Did you send a man down there to try to get the mail addressed to Stark City?

A. As I recall, we made application to get mail coming to Stark Bros. at Stark City.

Q. And didn't you send a man there for that purpose?

A. I will say that my nephew handled the details of this, whether there was a man sent or not, I cannot say. I do know that our company made an effort to have the mail addressed to Stark Bros. that found its way to Stark City, to come to us.

Q. Well, you authorized that, didn't you?

A. I approved it—yes.

Q. You knew that the William P. Stark Nurseries were located there at the time, didn't you?

A. I knew that he was growing stock there.

Q. You knew that he was getting mail there, too, didn't you?

A. Yes.

Q. You knew that Stark City was a post office established by the Postal Department at Washington, didn't you?

A. I knew the post office had been changed from 'Chester' to 'Stark City.'

Q. When did you send that man there?

A. I did not send a man there.

Q. When did your company send a man there?

A. I don't know that they did, but I do know that our
54 company made a request for the mail addressed to us that came to Stark City.

Q. What was your request with reference to getting letters addressed to Stark City, Missouri, after the William P. Stark Nurseries had been located there?

A. I cannot give you the details of that controversy, because I did not give the details my personal attention. I will say that we had received considerable mail that had come to us at Stark City, and which had been sent from Stark City to Neosho, according to the stamp on the envelope, and from Neosho forwarded to our company here. Delay had occurred in receipt of these letters.

Q. You said you received considerable mail of that character?

A. We have received some mail of that character.

Q. You said considerable mail.

A. We have received mail, I cannot say just how much, but we have received it for some years past.

Witness testified that the company had some five thousand salesmen throughout the country and that is as many as they had ever had; "I cannot give the exact number but our force of salesmen has been large for many years past, practically as large now as at any time in the past."

Q. "Your salesmen only carry the advertising matter you furnish them when they solicit business from their customers?

A. That is correct.

Q. They send all of their orders to Stark Bros. Nurseries & Orchards Co., Louisiana, Mo., don't they?

A. Yes.

Q. The orders are filled here?

A. Yes.

Q. And shipped to the various localities where they are taken by your salesmen?

A. Yes.

Q. That is the way you handle the business that is transacted through salesmen, isn' it?

A. Yes.

Q. They do not carry any trees around with them?

A. We sometimes send boxes of trees to salesmen that have not been sold, to be sold, sometimes to be used as sample trees; as a general proposition the bulk of our trees are not shipped until they are sold."

Witness testified that there was no post office at Stark Station; "It was spoken of usually as Stark Station or the Nursery Switch."

As to the Kansas City contract, plaintiff's Exhibit No. 34, witness testified:

Q. "Mr. Stark, you recall there was nothing said in Kansas City conference about any trademarks of your company, don't you?

A. There may have been some informal discussion about the Hale trademark. I don't know what was discussed between you attorneys, who really fixed up those matters. As far as I recall no trademark disputes were discussed except possibly the J. H. Hale.

Q. Now, Mr. Stark, you first attempted to have the Federal Trade Commission take up this matter complained of in this suit?

A. Our company made a complaint and placed it before the
55 Trade Commission in Washington some time in the year 1916—don't recall the date.

Q. Did you notify W. P. Stark that you were going to make this complaint before the Federal Trade Commission?

A. That matter was handled personally by our attorney and Mr. P. C. Stark. We had prior thereto taken up the matter of unfair competition with the Advertising Associated Clubs of the World, with the officials at Indianapolis, and to the best of my knowledge and belief this official had visited W. P. Stark and took the question up with him, that he was aware of our efforts there.

Q. After the official took it up with W. P. Stark he dropped the matter and declined to have anything further to do with it?

A. As I recall, they decided it was outside of their province to push. Not being of sufficient interest to the public, it being a private matter, and also being a proposition involving trademarks.

Q. You attempted to use this advertising association to have them interfere with W. P. Stark's advertising, didn't you?

A. We simply laid before the official of this advertising association the unfair methods being pursued by W. P. Stark. Their decision was that the methods were unfair and that W. P. Stark was so notified, but after that they decided that the trademark feature and other features was outside of their province.

Q. And they declined to have anything to do with it?

A. To the best of my knowledge and belief they made a protest to W. P. Stark, but it went no further."

Witness further testified with reference to the Federal Trade Commission, that a suit was instituted in the State Court at Louisiana, Missouri, against William P. Stark, and that service was gotten on William P. Stark in Louisiana, Missouri, and that suit was dismissed under the direction of the plaintiff company. In that suit the same parties were plaintiff and defendant as in this suit. Witness testified that, "As I recall, upon the advice of our attorney, we dismissed the suit here for the purpose of bringing it to the United States Court, as giving us more prompt relief, the trade-mark question being deemed advisable and preferable to be tried in this United States Court, rather than to drag along interminably in our state courts, who seldom have trade-mark litigation before them, purely done upon the advice of our attorneys, who handled this matter."

Witness testified that William P. Stark owned about 25% of the capital of the plaintiff company and that it was pledged with Mr. Paul Brown of St. Louis.

Q. "Didn't you request of him that in the event he sold out W. P. Stark's stock held by him as security for a note, that you would like to have him notify you of the time and place of sale?

A. As I recall, I did write to Mr. Brown, having been told by various parties that Mr. Brown wanted his money. He was sore and led me to believe that the stock might be sold, which he, Mr. Brown, held for collateral for a large note of W. P. Stark.
56 I wrote him in the event the stock was sold I would like to be notified."

Witness testified that he thought his company lost a very valuable man when William P. Stark left the company, but that he thought Lloyd C. Stark, who succeeded him, was a more valuable man.

Redirect examination:

E. W. Stark, as witness, identified plaintiff's Exhibit No. 41, a letter to Wilfley, McIntyre & Nardin, attorneys in this case for the defendants. The letter is dated January 15th, 1916.

Witness identified plaintiff's Exhibit No. 42, which is a letter dated January 15, 1916, to Wm. P. Stark Nurseries.

James F. Farrel, a witness on behalf of plaintiff, testified in his deposition taken at Louisiana, Missouri, on the 31st day of January, 1917, and read in evidence, as follows:

Witness testified that he was time keeper for plaintiff company; that he had been connected with this company about 32 years; that at the present time his duties were time keeper in the supply department and various things, wherever he could make himself useful, first one thing and then another. He testified that he recognized the label "Stark Trees" as a trade-mark used by the company, but he did not know anything about the registered part. "I have seen them use this for years, tags like this an dsimilar to this." The

witness testified that he remembered the trademark in 1893. The trade-mark identified by the witness is the same as plaintiff's "Exhibit No. 1" attached to the deposition of E. W. Stark. Witness testified that they tack this on the end of boxes that contain the trees that were shipped from the plaintiff company. Witness testified that boxes on which this label was attached contained trees that had already been sold.

H. L. REED gave his deposition at the same time as did the last presented witness, Farrel, which deposition was read at the trial. Mr. H. L. Reed testified as follows:

That he had been connected with the plaintiff company since 1886, and that the company used cards and stencils of a trade-mark in the form of stencils or cards "Stark Trees," the letter S being large and the letters diminishing in size, and the word "Trees" being under the name "Stark." Witness testified that plaintiff's "Exhibit No. 1" was the form of label used. To the best of his recollection the first time he had ever attached this trade-mark to boxes was in 1893. Witness testified that this label had been used continuously from 1893 to the present time. Witness testified that he was at the present time superintendent of outside work with the plaintiff company. Witness testified that these tags were put on boxes with stencil or tacked on boxes, and that these boxes contained trees that had already
57 been sold to customers. "The boxes were used for the purpose of packing trees that had been sold to customers." Witness identified plaintiff's "Exhibit No. 1" as the form in which the words "Stark Trees" were arranged in the stencil.

S. D. MCCLEARY gave his deposition at the same time as the last two witnesses, which deposition was read in evidence at the trial. In his deposition he testified as follows:

That he had been with the company 26 years, the greater part of which time he had worked in the box factory, and that they used stencils on the boxes similar to plaintiff's "Exhibit No. 1," and that witness had stenciled the same on boxes, and that this had been done during the entire time that the witness had been connected with plaintiff company. Witness testified that these boxes were kept in the factory until they were hauled to the packing house to fill the orders, and that they were used for packing trees that had already been sold.

H. P. JAMESON gave his deposition for plaintiff, which was read in evidence, in which he testified as follows:

Witness testified that he resides at Kansas City, Mo.; that he was agent for plaintiff company; that he first commenced working for plaintiff in 1887, and that he has been working for them since except at certain intervals, and that since 1911 he has been working for them regularly.

"Q. As a salesman for Stark Brothers how do you proceed to get orders

A. I introduce myself as the representative of Stark Brothers Nurseries and Orchards Company, or the Stark Nurseries, and request their business.

Q. That is, as the representative of the old original Stark Nurseries?

A. Yes, sir; that is in recent years now; I did not have to refer to it only in recent years, because there was another Stark Nurseries and I had to explain about that. People asked me if I was representing Wm. P. Stark or the old Stark Nurseries of Louisiana. The question was put to me right square that I was a 'faker,' that is the reason I had to explain. They reported that there was a circular out that the Stark Nurseries employed no agents."

Witness testified that he had seen one of the circulars, and identified plaintiff's "Exhibit Y-1" which is attached to his deposition. "Yes, I had to make explanation and had to show my commission from Stark Brothers Nurseries and Orchards Company as an agent."

"Q. Did showing this commission usually right matters?

A. Yes, sir; invariably.

Q. Did you ever have to argue to any length.

58 A. Not after I showed my commission; no, sir; that was prima facie evidence."

Witness testified that the circular "Exhibit Y-1" had an injurious effect in that it destroyed the customer's confidence in him as a salesman of Stark Brothers Nurseries, and that he often had to exhibit his commission. "They claimed that the Stark Nurseries claimed that they had no agents, and I had to then show them my commission of appointment to prove to them that I was an authorized Stark Brothers' agent, and that has happened quite often since 1911." Witness testified that this did not discourage him. Witness testified that customers thought the advertisements of defendant in papers and periodicals were the advertisements of the old Stark Company.

Counsel for defendant objected to this unless the advertisement was produced and introduced in evidence, and objected further because it calls for a conclusion of the witness and was hearsay; which objection having been overruled, counsel for defendant then duly excepted.

Witness testified: "I lost business often because they thought I was a 'faker' and I had to try and explain; some I could and some I could not. I told them I had been with the Company off and on for twenty years and I knew where I stood and knew my ground; I had my commission of appointment there. Some I placed orders with, others I didn't."

"Q. You say sometimes you lost business. Is it a fact that these people thought in dealing with W. P. Stark they were dealing with the original Company?"

Counsel for defendant objected to this question as calling for a conclusion of the witness, and as leading and suggestive; which

objection having been overruled, counsel for defendant duly excepted.

"A. They plainly said to me they would not buy from an agent of Stark Nurseries because they claimed to have no agents.

Q. Well, then, would you say that the advertising of these two Stark Companies caused confusion in the mind of your customer?

A. Yes, sir.

Q. Was there any further confusion than that on the sales idea?

A. Well, I don't know.

Q. In the name Stark?

A. I presume that was all the trouble, the name Stark.

Q. Well, do you know or can you state that customers have said to you that they were confused in the idea of the two companies by the name of Stark?

A. Yes, sir.

Q. Have any of your customers said to you that the two companies were the same?

A. No, sir.

Q. You have just testified that some of your customers believed that the two Stark Companies were one and the same. Do you mean that?"

Counsel for Defendant: "We object to that question as
59 argumentative and trying to get the witness to change an answer that has already been made."

"A. No, sir; not that I can recall."

"I solicit their business and I get it some times, most of the time, and sometimes I don't. I don't know what prompts them to buy from me. I don't know where they form their conclusions or why, but they buy from me."

Witness identified the label "Stark Trees" which is attached to his deposition and marked plaintiff's "Exhibit Y-2," which exhibit, however, is the same as plaintiff's "Exhibit No. 1" attached to the deposition of E. W. Stark.

This witness was recalled after the taking of depositions of several other witnesses and testified as follows:

"Q. Mr. Jameson, in your direct testimony you stated there was no confusion about the two Stark names. Will you please explain to me just what you meant?"

Counsel for defendant offers the following objection—"We object to that. It was a simple question that he asked and a simple answer. He answered it in plain English that anybody can understand, and we object to his now testifying and explaining an answer after he has gone out and talked to the attorneys for the plaintiff in the case."

"A. I understood what he meant; as far as my being deceived or misunderstanding it, I did not; but the people did not under-

stand it and I had to explain. There was no confusion in my mind whatever, but in the mind of the people there was; they was under the impression they was doing a double business, a mail order business and an agent business.

Q. You mean under one head?

A. Under one head; yes, sir.

Q. And at their respective headquarters?

A. Louisiana, Missouri.

Q. Of both companies?

A. Oh, no; one at Stark City, the mail order at Stark City, Missouri, and the agent headquarters at Louisiana."

J. H. BOARD of Louisville, Kentucky, gave his deposition for plaintiff, which was read in evidence, in which he testified as follows:

Witness testified that for two and one-half or three years he had been selling fruit trees for the plaintiff company. Witness testified that he had quite frequently to tell his customers that the Stark he represented had agents, "and that Wm. P. Stark ran another nursery at Stark City, Missouri, and perhaps they were confused by that circular which he puts out."

"Q. Have you ever run into any confusion because of their being two Starks in the nursery business?

A. Well, I can't say, you understand, that I have. We can't tell, you understand, whether people believe us or not. Now
60 those that will come out and explain to us that they have received the circular that they have no agents, we usually can explain by saying that W. P. Stark in the last three or four years started a nursery at Stark City, Missouri. We usually explain that way. But where they refuse to say anything about that they have received the circular, you know, we don't know what causes this, we sometimes don't sell them. We have some customers, of course, that it has taken me quite awhile, you understand, to reconcile them to the fact.

Q. To the fact of what?

A. We have no agents, and also some question I have with them about the right to sell the J. H. Hale peach. Now, I have had more confusion in regard to that."

Witness testified that the Wm. P. Stark circular stated that the W. P. Stark Nurseries have the exclusive right to sell the J. H. Hale peach. "I have had some customers that were awful hard to convince, people that were thinking people too, from the circular they had received from them stating, you understand, that they were the only one- that had the right to sell the genuine J. H. Hale peach." Witness testified that he had a customer who was afraid he would not get the genuine J. H. Hale peach, and that he understood that he gave the order for the J. H. Hale peach to the defendant Company. Witness testified that Bennett H. Young had told him that he was thinking about bringing a suit to enjoin Stark Brothers Nurseries and Orchards Company from selling the J. H. Hale peach. Witness testified that he finally sold his cus-

tomer the J. H. Hale peach. Witness testified that W. P. Stark Nurseries covers the same territory that he covers and that he frequently had to explain that the W. P. Stark Nurseries was a different nursery altogether.

"Q. Have any of your customers ever asked you as to the identity of the W. P. Stark Nurseries?

A. No, I don't know that they have.

Q. Do you understand what I mean by that question? Have any of the people you call on asked you if there was any difference between the W. P. Stark and Stark Brothers?

A. Oh, yes, they quite frequently do that. They will say 'I did not know there were two nurseries.' They quite frequently tell me, you understand, that they have a circular stating they have no agent, and then after I explain to them, they say, 'Well, we didn't know there were two nurseries, we thought the Stark Nurseries were all the same.' "

Witness identified plaintiff's "Exhibit Y-2" attached to witness Jameson's deposition, which is the same as "Exhibit No. 1" attached to E. W. Stark's deposition, and said that he had frequently seen it on boxes shipped by Stark Brothers.

On cross examination this witness testified that he had seen this label on packages containing orders which he had sold.

61 FRANK L. STRAIGHT, of Otsego, Michigan, gave his deposition for plaintiff, which was read in evidence, in which he testified as follows:

Witness testified that he was a fruit grower and a salesman for plaintiff Company; that he had been a salesman for three years; that he only sold in the winter time. Witness testified that he had an experience with one of his customers who said, "How is this, I have a letter from the Stark Company saying they don't employ any agents, and you are here as an agent trying to sell me trees," but that he explained the situation to her and got her order. Witness testified that there were a great many local nurseries in his locality, small nurseries, and that the people there would say, "Well, I guess we will drive over to so and so and get our stock because we know these people; they have got the stock in the trenches; we will go and get it and see what we are getting." Witness was handed plaintiff's "Exhibit Y" which is attached to the deposition of Mr. Jameson. He testified that he had never seen any of the circulars. He spoke of the circular with reference to the "Delicious" apple.

"Q. You say that customers were confused about the origin of the Delicious apple?

A. Yes, sir; also the J. H. Hale peach; I was selling the J. H. Hale peach at that time.

Q. You say they became suspicious of you. What do you mean?

A. Well, I judge from their experience and from the fact that they say, 'We prefer to go to the local nurseries and buy our trees where we know the people and know what we are getting.' "

Witness testified that he could not say positively that these people took him for the representative of the W. P. Stark Nurseries, but that they often got the companies confused and might think that he represented either one of them.

On cross-examination witness testified there were a large number of local nurseries in his community and had been there from ten or fifteen to twenty years.

JOHN H. CLARK gave his deposition for plaintiff, which was read in evidence, in which he testified as follows:

Witness testified that he lived at Chariton, Iowa. He testified that in the summer time he farmed and in the winter time he sold trees out of town; that he had been selling for the plaintiff Company since 1911.

"Q. You say you used to say Stark Brothers or Stark Bros. trees. What caused you to change your method of introducing yourself?
A. Well, they would say that there was another Stark Nurseries and prices was a little bit different, and some of them would use one excuse, some another. The greatest trouble I had, they
62 thought the Nurseries was doing double work.
Q. What Stark?
A. Stark Brothers was selling under two names, a mail order and by agents, and they thought that by buying direct from W. P. Stark they would save that commission what I get.
Q. You mean, you refer to W. P. Stark?
A. Yes, sir; but my main trouble was they thought it was one and the same nurseries, but under different names; that is, the same nurseries but doing business in two ways."

Witness testified that he encountered some confusion about the "Delicious" apple, which was sold by both companies, and that there was some confusion about Stark City and Starkdale.

"Q. In explaining to your customers the difference between the two companies, have you lost a good deal of time?
A. Yes, sir; I have lost time.
Q. Have you lost any customers?
A. Well, I have lost some. I know some said they was going to send, some I know have, to the other."

Witness identified plaintiff's "Exhibit Y-2" attached to Mr. Jameson's deposition, which is the same as plaintiff's "Exhibit #1" attached to E. W. Stark's deposition, and testified he had seen it on boxes of Stark Brother's trees which had been shipped.

On cross-examination witness testified that he had seen plaintiff's "Exhibit #1" on boxes containing trees that he had already sold. Witness testified that he knew that Stark Bros. Nurseries and Orchards Co. took orders through mail in his territory.

G. S. WARRICK gave his deposition for plaintiff, which was read in evidence, in which he testified as follows:

That he resided at Mackinaw, Illinois; that he worked at painting in the summer time and in the winter at odd times he sold trees for the plaintiff company.

"Q. Well, in your tree selling capacity, how are you known among the people in your community? That is, how do they describe you, as tree salesman or agent?

A. Well, salesman or agent for Stark Brothers, Louisiana, Missouri.

Q. In canvassing for the sale of Stark Bros. trees, have you run into any unusually hard competition with other nurseries?

A. Oh, yes, we find a lot of competition there from the other nurseries, some right at home and at Bloomington, Illinois, Oakdale, and others in northern Illinois.

Q. What nursery in the United States gave you the most competition?

A. Well, I am not prepared to say now. When you are out in the field there is so many, first one nursery and then you rub up against another.

63 Q. Have you ever run into the W. P. Stark Nurseries of Stark City, Missouri?

A. Yes, sir; about Fourteen months ago was my first experience; I think it was fourteen, maybe fifteen. About the first of the year I wrote in to the house to find out where I was at.

Q. About what nursery?

A. Well, about the W. P. Stark Nurseries; whether it was the same concern or not, because one claimed one peach to be the best, while I claimed the Stark Alberta was the best peach, and I thought I was going to get whipped."

Witness testified that W. P. Stark's activities in his territory caused some confusion, but that he got straightened out and found that there were two nurseries. Witness testified that sometimes he had to show his commission. Witness referred to an advertisement of W. P. Stark Nurseries in the "Country Gentlemen" which he said caused some confusion because it said that they have no salesmen. Witness says, "It was in the Country Gentlemen, but I can't say the date, because I never thought anything more about it."

"Q. Have you ever lost any orders because of confusion between these two nurseries?

A. I can't say that I have."

R. L. GILMORE gave his deposition for plaintiff, which was head in evidence, and in which he testified as follows:

That he resides in Newton, Kansas; that his occupation was mixed, carpenter and selling fruit trees; that he sold fruit trees for the plaintiff company; that he commenced in the fall of 1914; that he had run into competing nurseries as he lived in a mail order district.

Q. "What is the principal competitor in your district?

A. Well, I can hardly say which one would be the worst; several of them in there.

Q. Does W. P. Stark of Stark City, Missouri, sell trees in Kansas?

A. Yes, sir; he sells trees in Kansas.

Q. You say that W. P. Stark does do business in Kansas? Are they close competitors of yours?

A. Well, not very close, but they are competitors all right.

Q. Have you ever known of any confusion in the minds of customers or prospective customers?

A. Quite often.

Q. Will you please state some instances?

A. Well, we had some parties that lived at Hesston, Kansas, that got so confused that I couldn't convince them that I was representing Stark Brothers Nursery. They said they thought the two were working, as this gentleman said awhile ago, one and the same.

Q. Any others that you have in mind?

A. Well, they thought that I was an imposter. I represented to be the agent of the company.

Q. Why did they think that you were an imposter?

64 A. And I showed them my commission, but still I didn't get the order. I advanced the argument that they could send to the company and find out, and then they took up the argument that there was two different companies, one was a company doing business through mail orders and the other through agents, and they brought out the statement from the Stark City man that he didn't employ any agents, and that is what they banked on, what he told them, that he didn't employ agents.

Q. You said to them that you were representing the Company at Louisiana, Missouri,—were Stark Brothers' agent?

A. Yes, sir.

Q. What caused the prospects to discredit you?

(By Mr. Wilfley: We object to that as calling for a conclusion.)

A. Why, the catalogue that they had been reading caused them to think that I was an imposter by representing that I was selling certain kinds of fruit that was claimed by Stark Brothers; they happened to be the originators of this kind of fruits.

Q. Did you find that the W. P. Stark prices offered out there were cheaper, or more expensive than Stark Brothers' prices?

A. Well he was a few cents under the price that I was selling at —cheaper than I was selling at.

Q. As a usual proposition, out in your territory. W. P. Stark quotes lower prices than your Company quotes?

A. Yes, sir.

Q. Quite a little lower?

A. Oh, quite a little bit."

Witness testified that he had to explain to customers that he was representing Stark Bros. and not the Stark City Nurseries. Witness testified that he lost Mr. Anther's order because he had catalogues.

Q. "Have you ever observed that the prospects that you call on usually had catalogues of W. P. Stark or literature?

A. Quite a good many of them. There are very few of them but what have catalogues from mail order houses.

Q. Have you ever seen any orchards in your territory planted with W. P. Stark trees?

A. Yes, sir.

Q. Did the owners of these orchards ever discuss the good or bad qualities of those trees, and if so state what they said?

By Mr. Wilfley: We object to that as incompetent, irrelevant and immaterial

A. Yes, sir.

Mr. Matson: Go on now and state what they said.

A. That they were very inferior trees when they received them and a great many of them had died; and right now I will explain that they was under the impression that those trees were bought from the Stark Brothers Nursery.

Mr. Remick: Did the owners of these orchards tell you that?

A. They found out I was the agent and they come to me. A lady that lives in Missouri and has a farm in Kansas wanted to know what I was going to do about replacing her trees.

Mr. Wilfley: What was her name?

A. Her name was Davis, but I can't give her full name.

65 Her farm is four miles south and one mile west of Newton. I told her that I had never done no business with her, hadn't had anything to do with the trees. I had never sold her trees, and as for replacing those trees, the Company that I worked for never obligated themselves to replace any of the trees, and she claimed that she had bought them of the Stark Brothers, but later on when she went to look over she found that they had been bought from the other nursery at Starkville, Missouri.

Q. You mean Stark City, Missouri?

A. Yes.

Q. You say you found they were bought at Stark City Nursery. What nursery do you mean by that?

A. I mean the W. P. Stark Nursery.

Q. Is that the only instance of confusion that you have run into out there in Kansas?

A. No, sir, it is not. Mr. Smith at Hesston, Kans., I was to get his order, from the fact that he had catalogues and a letter he had received from W. P. Stark stating that they didn't employ any agents, that they had no representatives. So he refused to give me his order. I spent quite a while with him. I had my book and papers with me showing that I was representing Stark Brothers Nurseries & Orchards Company at Louisiana, Missouri. Well, he wouldn't admit that he was convinced, at least he wouldn't give his order to me."

Deposition of Mrs. Charles F. Blair, Taken in Chicago on the 19th of March, 1917, on Behalf of Plaintiff, and Read in Evidence at the Trial.

Mrs. Blair testified that she resided at 10732 South Wood Street, Morgan Park, Chicago, Illinois, and is a bookkeeper and cashier for Woodwards, Inc., of Chicago, Illinois. She identified a tag attached to a bundle of apple trees received by her from Wm. P. Stark Nurseries, Stark City, Missouri, which was attached to her deposition and marked plaintiff's Exhibit Z-1.

She stated that she received the bundle of trees on November 28th, 1916. She identified the original shipping tag that was attached to the bundle of trees received from defendants, which shipping tag was attached to her deposition and marked plaintiff's Exhibit Z-2.

She identified a receipted bill for the trees, which was attached to her deposition and marked plaintiff's Exhibit Z-3. She identified plaintiff's Exhibit Z-4 as an identical tag which the plaintiff's Exhibit Z-1. She testified that there were seventeen trees in the four bundles received by her, and each bundle bore a tag of the William P. Stark Nurseries as Exhibits Z-1 and Z-4.

Plaintiff offers in evidence these four Exhibits, Z-1, Z-2, Z-3 and Z-4.

Counsel for defendants object to Z-1, because it is apparent that it is a mutilated tag and does not show all that was on the tag
66 in its original form and in the present condition of the Exhibit it furnishes no evidence that it is competent, relevant or material.

Exhibit Z-2 is objected to, for the reason that on its face it shows no evidence that it is competent, relevant and material in this case. The same objection is made to Exhibit Z-3. Objection is made to Exhibit Z-4, because the evidence shows that this exhibit was not attached to any of the merchandise received by the witness from the William P. Stark Nurseries, which objection having been overruled at the reading of the deposition at the trial of the case, the counsel for defendants then and there excepted.

On cross examination Mrs. Blair testified that she did not have an orchard at her home; that she was cashier and bookkeeper for Woodwards, Inc.; that Woodwards, Inc., is an advertising agency, which does business with Stark Brothers Nurseries & Orchards Company as advertising counsel; that she sent this order to defendants at the request of Woodwards, Inc., and had no other interest in the matter, and that she did not herself pay for the trees, but the same were paid for by Woodwards, Inc.

In the District Court of the United States in and for the Southwestern Division of the Western District of Missouri.

In Equity. No. 18.

STARK BROTHERS NURSERIES & ORCHARDS COMPANY, Plaintiff,

vs.

WILLIAM P. STARK and WILLIAM H. STARK, Trustees, Doing Business under the Name and Style of William P. Stark Nurseries, Defendants.

Pursuant to agreement of counsel, depositions on behalf of plaintiff in the above entitled cause were taken before Oliver J. Taylor, notary public, at the office of Andrew B. Remick, Railway Exchange Building, St. Louis, Mo., on March 23, 24 and 28, 1917, plaintiff being represented by Andrew B. Remick, Esq., and John W. Matson, Esq., X. P. Wilfley, Esq., and Eugene Pearson, Esq., appearing for the defendants, and during the proceedings the following stipulation was entered into covering certain exhibits to-wit, plaintiff's Exhibits X-2 to X-56, inclusive, offered in evidence and for use on the trial of said cause:

Mr. Matson: It is agreed and stipulated between counsel for the plaintiff and the defendants in this case that the following documents are offered in evidence by the plaintiff, having been received by the plaintiff in due course of mail from the parties whose names are signed to the documents, and that there will be no question as to the signatures or other matters contained in those documents, except such objections as may be made to them at this time.

The first offer in evidence is post-card dated February 15, 1916, mailed at New Berlin, Penn., and signed H. J. Solomon, Box
67 126, addressed to "Stark Bros. Nurseries, Louisiana, Mo.," which is marked plaintiff's Exhibit X-2.

Mr. Wilfley: We object to this as incompetent, irrelevant and immaterial as to any issue raised by the pleadings in this case.

Mr. Matson: It is admitted that the blue marking on plaintiff's Exhibit X-2 and the initials "P. C. S.," and the same blue marking on any of the other exhibits that are offered, was not part of the original post-card at the time it was received by the plaintiff company in due course of mail.

The next is plaintiff's Exhibit X-3, which is a post-card signed W. M. Thomas, Indian Springs, Tenn., Jan. 29, 1916, addressed Stark Bros., Louisiana, Mo.

Mr. Wilfley: We object to plaintiff's Exhibit X-3, on the ground that it is incompetent, irrelevant and immaterial to any issue in this case and has no bearing whatever upon any question raised by the pleadings in the case.

Mr. Matson: We next offer plaintiff's Exhibit X-4, which is post-card signed J. F. Sprinkle, 440 N. Y. Ave. N. W., Washington, D. C., and addressed to Stark Bros. Nurseries, Louisiana, Mo.

Mr. Pearson: Let that go in subject to the same objection.
Mr. Matson: We offer the following additional exhibits:
Plaintiff's Exhibit X-5.
Same objection.
Plaintiff's Exhibit X-6.
Same objection.
Plaintiff's Exhibit X-7.
Same objection.
Plaintiff's Exhibit X-8.
Same objection.
Plaintiff's Exhibits X-9, 10 and 11.
Same objection.
Plaintiff's Exhibit X-12.
Same objection.
Plainti's Exhibits X-13 and 14.
Same objection.
Plaintiff's Exhibits X-15, 16 and 17.
Same objection.
Plaintiff's Exhibits X-18 and 19.
Same objection.
Plaintiff's Exhibits X-20, 21 and 22.
Same objection.
Plaintiff's Exhibits X-23 and 24.
Same objection.
Plaintiff's Exhibit X-25.

It is stipulated that the writing in lead-pencil on Exhibit X-25 was not on there at the time the letter was received.

Same objection, and the further objection that the postal card referred to in the exhibit is not produced.

68 Plaintiff's Exhibits X-26 and 27.
Same objection.

Plaintiff's Exhibits X-28 and 29, with the stipulation that the initials "P. C. S." and the figuring in lead pencil, with the green marks on Exhibit X-28, were not on there when received by plaintiff in due course of mail.
Same objection.
Plaintiff's Exhibits X-30 and 31.
Same objection.
Plaintiff's Exhibit X-32.
Same objection.
Plaintiff's Exhibits X-33 and 34.
Same objection.
Plaintiff's Exhibit X-35.
Same objection.
Plaintiff's Exhibits X-36 and 37.
Same objection.
Plaintiff's Exhibits X-38 and 39.
Same objection.
Plaintiff's Exhibits X-40 and 41.
Same objection.

Plaintiff's Exhibits X-42 and 43.
Same objection.
Plaintiff's Exhibits X-44 and 45.
Same objection.
Plaintiff's Exhibits X-46 and 47.
Same objection.
Plaintiff's Exhibit X-48.
Same objection.
Plaintiff's Exhibits X-48 and 50.
Same objection.
Plaintiff's Exhibits X-51 and 52.
Same objection.
Plaintiff's Exhibits X-53 and 54.
Same objection.
Plaintiff's Exhibits X-55 and 56.
Same objection.

It is further agreed that the notary public, Oliver J. Taylor, shall send this stipulation, together with the exhibits, to the clerk of the court where this case is pending, and the stipulation and the exhibits are to be used in evidence in this case, subject to the objections made to same, the same as though some witness had testified to the writing, sending and receipt of exhibits, and all signatures to this stipulation are hereby waived.

In accordance with the foregoing, said stipulation and plaintiff's Exhibits X-2 to X-56, inclusive, offered in evidence at the taking of depositions on the part of the plaintiff as heretofore shown, are herewith transmitted to the clerk of the District Court of the United States in and for the Southwestern Division of the Western District of Missouri, at Joplin, Missouri, this — day of April, 1917, for use in evidence on the trial of the above entitled cause, and I hereby certify that this is a true and correct transcript of the record and proceedings before me.

69

____ ____,
Notary Public.

(*Stipulation.*)

It is agreed by counsel for the plaintiff and the defendant that letter dated May 22, 1915, addressed to Stark Bros. Nurseries & Orchards Company, Louisiana, Mo., and signed by D. E. Anderson, of Burwell, Nebraska, was mailed by Mr. Anderson at Burwell, Nebraska, on May 25, 1915, and that if Mr. Anderson were present and his deposition taken he would testify to the facts stated in that letter as being true; that he accompanies said letter with a label attached to the letter, which has among other things marked on the face of it the name "William P. Stark Nurseries," which label is marked Plaintiff's Exhibit Y-3 and attached to this stipulation; that said letter is marked Plaintiff's Exhibit Y-4, and the envelope in which said letter and said label are contained is marked Plaintiff's Exhibit Y-5, both being attached hereto; that Stark Brothers Nurseries & Orchards Company received said letter and said label in due course of mail from said D. E. Anderson.

It is further stipulated that prior to the institution of this suit the William P. Stark Nurseries, defendant in this case, sold and did make various shipments of trees to different points in the United States to which were attached tags of this character, to wit, as shown by Plaintiff's Exhibit Y-3 attached to this stipulation relative to letter from D. E. Anderson.

It is further stipulated that the notary who is this day taking depositions in the case of Stark Brothers Nurseries & Orchards Company vs. William P. Stark et al. shall certify to this stipulation and file the same with the depositions, and the signatures of counsel to said stipulation are hereby waived.

Mr. Wilfley: We object to the letter on the ground that the same is incompetent, irrelevant and immaterial to any issue in this case, and it does not tend to prove any of the allegations of the bill of complaint. This same objection is made to the envelope, Plaintiff's Exhibit Y-5, and to the tag, Plaintiff's Exhibit Y-3.

AUGUST C. GANZ gave his testimony on behalf of plaintiff, which was read in evidence, in which he testified as follows:

That he was formerly postmaster of Louisiana, Missouri, from January 1, 1910, to January 8, 1914; that he was personally acquainted with Clarence M. Stark, E. W. Stark, and W. P. Stark, and knew their families; that he had known the Stark Bros. Nurseries and Orchards Company for 25 years; that he remem-
76 bers the time W. P. Stark severed his connection with plaintiff company, in June, 1912. Witness testified that on the day W. P. Stark retired from the Louisiana company, he gave the post office at Louisiana instructions, or made demand that all mail addressed to W. P. Stark Nurseries Co. or any other nurseries by the name of Stark, or Stark Nurseries, or something to that effect, be delivered to W. P. Stark, who had been claiming that mail. "We had been given instructions to deliver that mail separately to him prior to that time." Witness testified that the Stark Bros. Nurseries & Orchards Company also claimed the mail addressed to W. P. Stark Nurseries Company, and also claimed all mail addressed to W. P. Stark as treasurer of Stark Bros. Nurseries and Orchards Company, and all mail sent to W. P. Stark as treasurer. "Prior to that time that mail had been delivered to Stark Bros. Nurseries & Orchards Company. For a short time before Mr. W. P. Stark retired, we were delivering it to the Nurseries Company, but separately, tied in a separate package, to Mr. W. P. Stark—to his department." Witness testified that W. P. Stark was treasurer of the company while he was postmaster, that is until the time Mr. W. P. Stark left the company.

"Q. Did you find much mail that had been really intended for the plaintiff company that was delivered to W. P. Stark, and vice versa?

A. Not at that time. Afterward there was some mail that you might call mis-delivered. The mail came addressed in so many different ways that it would be practically impossible to deliver all

without making any mistakes; some mail came that was intended for W. P. Stark Nurseries that was delivered to Stark Bros. Nurseries & Orchards Company which was returned to our office, and returned to W. P. Stark, forwarded to him, delivered to him, and I think some the other way."

Witness testified that about 50 per cent of the business of the post office at Louisiana, Missouri, was done by Stark Bros. Nurseries & Orchards Company. Witness testified that after W. P. Stark severed his connection with the company, the controversy about the mail continued, and that there was more or less controversy as long as he was postmaster. Witness testified that the controversies were submitted to the Attorney General of the Post Office Department at Washington. Witness identified plaintiff's "Exhibit X-1" as a copy of a letter dated Washington, August 12, 1912, signed R. P. Goodwin, Assistant Attorney-General.

Counsel for defendant objected to this letter as incompetent, irrelevant, and immaterial to any issue in the case; which objection having been overruled, counsel for defendant then and there duly excepted.

Witness testified that he gave Mr. W. P. Stark a copy of the letter, plaintiff's "Exhibit X-1."

"Q. This order, plaintiff's "Exhibit X-1," was the result of a hearing before the Department at Washington growing out of claims made by W. P. Stark, W. P. Stark Nurseries Company, and
71 Stark Bros. Nurseries & Orchards Company over the mail matter coming to that office?"

Counsel for defendant object. "There is no evidence about what that grew out of; witness was not there in Washington; was not present at the hearing, if a hearing was had, and it would be hearsay pure and simple for him to attempt to answer a question of that kind. He would be answering something he knew absolutely nothing about." Which objection having been overruled, counsel for defendant then and there duly excepted.

Witness said that he had known of a post office in Pike County called "Stark" and another called "Starkdale"; that very seldom mail came to the Louisiana post office addressed to the Stark Bros. Nurseries & Orchards Company of "Starkdale," frequently mail came addressed to said company for "Stark"; in fact mail came sometimes just simply addressed "Missouri, Pike County," without the Louisiana at all. It would be sent to Stark Bros. or Stark Nurseries & Orchards Company. "But the claim of the Nurseries was anything that was addressed to Stark or Nurseries, or any combination."

Witness testified that he thought there was mail addressed to W. P. Stark, treasurer, intended for the delivery of plaintiff company.

"Q. I ask you whether W. P. Stark did at any time try to have a post office established at the Stark Bros. Nurseries & Orchards Company office, which is outside the City of Louisiana, under the name of Stark?

A. He tried to have a branch post office established there, and I wrote several letters to the Department for it, but I don't believe

there was ever any decision as to the name, there were several names considered, but none decided on."

PAUL C. STARK gave his deposition, which was read in evidence in the case, as follows:

Witness testified that he was assistant secretary of Stark Bros. Nurseries & Orchards Co.; that he was 25 years old, and had been with the company off and on since he was a boy; that he became officially connected with the company in June, 1912, after his graduation from Cornell University, and has been regularly with the company ever since; that he is a son of Clarence M. Stark, former president of plaintiff company, now deceased.

"Q. During your active connection with the Stark Company since 1912, will you state if there has been any confusion by reason of the W. P. Stark Nurseries of Stark City, Missouri?

A. Continuously since I went into the employ of the company there has been confusion in mail matters and advertising between the Stark Bros. Nurseries & Orchards Co. and the W. P. Stark Nurseries, which were first located at Chester, Missouri, and afterwards the name was changed to Stark City, Missouri."

72 Counsel for defendant objected and asked that the answer be stricken out, as it is a conclusion of the witness; which objection having been overruled, counsel for defendant then and there duly excepted.

"Q. Upon what do you base that statement about confusion between the two Stark Companies?

A. Continuously since I have been connected with the company there has come to my desk in due order of business, mail matter which showed on the face of it that the writer had been confused between Stark Bros. Nurseries & Orchards Co. and the W. P. Stark Nurseries."

Counsel for defendant objected and asked that the answer be stricken out for the reason that the mail matter that the witness referred to is the best evidence, and that the answer is a mere conclusion of the witness; which objection having been overruled, counsel for defendant then and there duly excepted.

"Q. Have you any mail matter with you upon which you base these various statements? If so, please present it.

A. I have here a large number of letters which have been received by our company and which came to me in due order of business, and I herewith present letters which I ask to be marked as plaintiff's "Exhibit X-57" and a post card which I ask to be marked as plaintiff's "Exhibit X-58," and offer them in evidence in connection with my testimony."

Counsel for defendant objects to this because there is no evidence that there is any such person in existence as the party whose name is signed to the post card, for all that appears from this record it might have been written by some one who was attempting to prepare

evidence for this case and was not otherwise interested in either one of the parties to this litigation; and in its present form the post card is mere hearsay evidence. As to the carbon copy it is simply a self-serving statement, as there is no evidence that there is any person of the name which is upon the carbon offered in evidence, the original has not been accounted for. A further objection is made that neither the carbon copy or the letter nor the post card are either competent or material to any issue in the case.

Witness testified that plaintiff's "Exhibit X-58" was received by him in due order of business and was answered by him on February 26, 1917, as shown by "Exhibit X-57."

Witness identified plaintiff's "Exhibit X-59," a letter, and "Exhibit X-60," an envelope, and offered the same in evidence.

Counsel for defendant objected that they were hearsay and not properly identified; were incompetent, irrelevant and immaterial; which objection having been overruled, counsel for defendant then and there duly excepted.

Witness identified plaintiff's "Exhibits X-61 to X-64," which are respectively a letter purported to be from F. O. Comstock, from Red House, West Virginia, and envelope attached, which is addressed to Stark Bros. Nurseries & Orchards Co., 240 Stark Station,
73 Louisiana, Missouri, and enclosing a coupon cut from one of the advertisements of Stark Bros. Nurseries & Orchards Company; also a carbon copy of letter dated March 1, 1917, with the above address, which witness testified he dictated personally.

Counsel for defendant objected to the introduction of these exhibits on the ground that they were incompetent, irrelevant and immaterial; that the purported letter was hearsay evidence; that the carbon copy was a self-serving declaration, the original had not been accounted for, and there was no evidence that there was such a person as F. O. Comstock, or that the letter purported to be from him was written in good faith; which objection having been overruled, counsel for defendant then and there duly excepted.

Witness identified plaintiff's "Exhibit X-65" and "X-66," purported to be a letter written by Rankin Roberts, and envelope attached, addressed to Stark Nursery, Starkville, Missouri.

Counsel for defendant objected to these exhibits on the ground that they have not been identified, and that they were mere hearsay evidence; that there is no evidence that there ever was such a person as Rankin Roberts; and the further objection was made that the exhibits were irrelevant, incompetent and immaterial to any issue in the case; which objection having been overruled, counsel for defendant then and there duly excepted.

"Mr. Remick: If you will allow witness to introduce these consecutively and let him go back over them, then you can object to everything that he goes back over. Have you any objection to that?

Mr. Wilfley: Well, just proceed.

A. I offer these letters which came to us in due course of business and ask that they be marked as exhibits. In addition to these

letters which I am offering, the envelopes in which they were received by us through the mail are attached.

Mr. Pearson: You see, we don't know what he is offering. That doesn't identify what he is offering at all.

Mr. Matson: I am trying to expedite this matter. In connection therewith are some postal cards, are there not?

A. Yes, sir, in addition to the letters and envelopes there are also included in these exhibits numerous post cards which came through the United States mail—came to us in due course of business.

Mr. Matson: In connection with Mr. Paul C. Stark's testimony at this time we offer in evidence Exhibits Nos. X-67 to X-164, inclusive, and ask Mr. Stark to explain those exhibits.

Mr. Wilfley: We object to the introduction of these exhibits X-67 to X-164, inclusive; first, because they are hearsay. There is no evidence that they were written by any persons whose names are attached to the several letters and postal cards. We object further that they are incompetent, irrelevant and immaterial to any issue in this case.

Mr. Pearson: We object further because there is nothing in any one of the exhibits that shows that the parties were misled or
74 confused by any advertisements of the defendants in this case, neither is there any statement or evidence in any of the correspondence that the plaintiff was in any manner damaged in any way by any act of defendants or either of them. We object to the exhibits being introduced in evidence in a bunch——

Mr. Matson: If you object on that ground, we will have to take each one individually.

Mr. Pearson: —because it is impossible to designate any particular objection to any one of the exhibits, and we therefore object to any particular exhibit that does not show on its face that the plaintiff was in any manner damaged by any act of the defendants or either of them, or that does not show that any confusion resulted from any particular act or advertisement on the part of the defendants or either of them that they were not legally and lawfully entitled to make.

Mr. Matson: If you object to the bunch, we will just simply have to take each one individually.

Mr. Pearson: The objection goes to the bunch, to show the court that it might be that some one of these exhibits would not be reached by the objection that we make, and we make that after stating that they are offered in a bunch, then we make the objection that any particular one that comes within our objection we object to.

Mr. Matson: I understand from you, Mr. Pearson, in your objection that you do not object on the ground that we are offering them as a bunch, but you do raise your objection simply so that you can make any specific objection which you care to raise to any one of these exhibits, not simply on the theory that they be introduced as a bunch from X-67 to X-164, inclusive?

Mr. Pearson: No, we make the objection so that if our objection would reach any specific one of these, then the court would take no-

tice of the objection as applying to that particular letter and not to the bunch.

Witness: I have here in my hand plaintiff's Exhibits X-67 to X-73, inclusive. These letters are addressed in various ways, including the following:

Mr. Pearson: We object to the witness stating the contents of any of the letters or how they are addressed for the reason that the exhibits show for themsleves what they contain, to whom they are addressed, how they are addressed, and for what purposes they are written, and the witness has not shown such knowledge or possession of the exhibits as would take his testimony outside of mere conclusions on his part or hearsay testimony.

Witness: These letters show in their addresses the words Stark, Missouri—Starkville, Missouri—Starkdale, Missouri, and Stark Brothers, Starkdale, Missouri. These exhibits are just a few examples of a large number of letters addressed in similar manner which we have been receiving for many years past. In past years we have advertised our address as Stark, Missouri—Starkdale, Missouri—Stark Station, Missouri, these advertisements appearing not only in national publications which circulate throughout the
75 country, but also appeared throughout our literature, catalogues, etc.

Mr. Pearson: We object to the foregoing answer or discourse of the witness because it is a mere conclusion or supposition on his part and it is not the best evidence of what he is attempting to fill in and prove. The advertisements would be the best evidence.

Witness: Mr. Pearson, I am not stating conclusions, but I am stating facts. I have literature and advertisements to prove these statements.

Mr. Pearson: The literature and the advertisements are the best evidence of those facts, if any such facts exist.

Witness: All this literature and advertisements are already in this case as exhibits, and I will produce more later.

These addresses, such as Starkdale—Stark, Missouri, etc., show that we are still receiving mail addressed in this way because our literature and advertisements stay in the hands of our customers for many years.

Mr. Pearson: We object to that answer because it is a mere conclusion of the witness, speculation and an argument, and making a statement of which he has no personal knowledge whatever.

Witness: I have personal knowledge of this, because I have visited fruit growers throughout the country and have seen these old catalogues issued in years past still in their possession. They keep them like an average man would keep an encyclopedia, if they want to look up anything about varieties or other fruit subjects.

Mr. Pearson: We object to the foregoing answer and the several answers for the further reason that they are immaterial, irrelevant

and incompetent for any purpose whatever in this case and are foreign to any issues raised by the pleadings.

Witness: I have in my hand plaintiff's Exhibits X-74 to X-79, inclusive. These post cards and letters and the attached envelope show that we received mail in——

Mr. Pearson: We object to any statement of the witness with reference to these Exhibits X-74 to X-79 as they speak for themselves, and the testimony of the witness can be merely hearsay, incompetent, irrelevant and immaterial to any issue in this case.

Witness: These exhibits that I have just referred to are merely samples of hundreds and hundreds of other letters that we have received in past years, also post cards and other mail matter, addressed in similar manner. These post cards, letter and envelope show the fact that the public confuses the William P. Stark Nurseries of William P. Stark and the Stark Brothers Nurseries.

Mr. Wilfley: We object to that answer and ask that it be stricken out for the reason that it is a conclusion of the witness, a self-serving statement, purely speculative, incompetent, irrelevant and immaterial to any issue in the case.

Witness: These pieces of mail matter speak for themselves. The first exhibit, No. X-74, is addressed to William P. Stark Bros.
76 No. X-75 is addressed to Mr. W. P. Stark, Stark Bros. Nurseries & Orchards Co., Louisiana, Mo., and is postmarked 1914. Exhibit No. X-77 is addressed to Mr. W. P. Stark, Stark Bros. Nursery Co., Louisiana, Mo. No. X-78 is addressed to W. P. Stark Bros. No. X-79 is addressed to Mr. W. P. Stark, Stark Bros. Nurseries & Orchards Co., Louisiana, Mo. These are just a few examples of many other letters, post cards and other mail matter that we have received in past years similarly addressed. In our literature the name of W. P. Stark while treasurer of Stark Brothers was featured, and customers were instructed to write to W. P. Stark personally. Many thousands of post cards that were already addressed to W. P. Stark, Treasurer, Stark Brothers Nurseries & Orchards Company, Louisiana, Mo., were sent out and came back to us from our customers and prospective customers.

Mr. Wilfley: We object to any testimony about returned postal cards. They are the best evidence. And the same regarding envelopes.

Mr. Pearson: We object to the above discourse and comments on the various exhibits that the witness has in his hands, to-wit, exhibits from X-74 to X-79, inclusive, for the same and similar reasons that we objected to the previous batch of exhibits that the witness had before him in his hand, to-wit, Exhibits X-67 to X-73; and we make this general objection this way, referring to a former batch of exhibits, in order to save time.

Witness: I have here in my hand plaintiff's Exhibits X-80 to X-92, inclusive. Exhibit X-80 is addressed to Star Bros. Nursery Co., Louisiana, Mo.

Mr. Wilfley: We object to any comments with reference to these exhibits which the witness holds in his hand, to-wit, X-80 to X-92, as they speak for themselves, and any self-serving statement would be incompetent, irrelevant, immaterial and hearsay.

Witness: These Exhibits X-80 to X-92 show that orders intended for Stark Brothers Nurseries were sent to the William P. Stark Nurseries through mistake, and because the customers were confused in thinking that they were the same company and that the William P. Stark Nurseries were a branch of the original Stark Brothers.

Mr. Wilfley: We ask that that answer be stricken out for the reasons previously stated.

Mr. Matson: We particularly offer those exhibits just referred to by Mr. Stark for the purpose of showing the matters that he has stated in his testimony.

Witness: I have here in my hand Exhibits Nos. X-83 and X-84, being envelope and letter from Mrs. C. G. Kershaw, Ft. Payne, Ala. This letter is just an example showing that our customers send orders to the William P. Stark Nurseries, Stark City, Mo., thinking that they are sending them to the original Stark Nurseries at Louisiana.

Mr. Pearson: We object specifically to the letter referred to because there is no proof from any source that it is a genuine
77 letter written by the party whose name is signed thereto. And we object for the further reason that it bears every earmark of having been a trumped-up letter written for the purpose of using it in a lawsuit which the plaintiff had in mind to bring or was contemplating, and which it was making every preparation during this time to institute and to attempt to prove up. The letter has not been identified as having been written by the alleged writer thereof, and there is no proof that it came to plaintiff in the proper way. It is purely hearsay. And we further object to the comments of the witness on the same because he knows nothing about it except what he infers, and any comment on the letter, being a written instrument, is highly improper and should be stricken out of the record.

Witness: Mr. Pearson, I wish to say that this letter we have referred to as plaintiff's Exhibit X-84 was written voluntarily and was not trumped up. Furthermore, every one of these letters that we are offering as exhibits came to us voluntarily and unsolicited, and neither I nor anyone connected with our company has in any way asked that these letters or similar letters be written, to the best of my knowledge and belief.

Mr. Matson:

Q. Mr. Stark, you simply state in your testimony now "all letters." Do you mean thereby to answer Mr. Pearson's objections and insinua-

tions by referring to all the exhibits that you have offered from and including plaintiff's Exhibits X-67 to X-164?

Mr. Pearson: We object to that because it is leading and suggestive, and indicating to the witness the answer that is desired in order to fill a gap in the testimony that the attorney sees has been left open.

Mr. Matson: Attorneys always have a right to fill any gaps that have been left open, and any attorney will fill a gap, especially when it is suggested by the other side.

A. I want to say when I speak of letters that I refer to letters, envelopes, post-cards or any other mail matter of this nature that we are introducing.

Q. Proceed with the exhibits, Mr. Stark, and in so doing give the beginning and the ending of the exhibits that you have in your hand and attempt to talk about?

A. Plaintiff's Exhibit No. X-80 addressed to Stark Bros. Nursery Co., Louisiana, Mo., and which came in the envelope plaintiff's Exhibit X-81, shows that our customers mail orders to Stark City thinking that they are going to the original Stark Nurseries at Louisiana, Missouri, because we have in past years advertised Stark, Missouri—Starkdale, Missouri—Stark Station, Missouri, both in publication literature, on our box cars, and in almost every conceivable manner, and the similarity of the name Stark City and of the name of the two firms have confused the public in thinking they are the same company. This is shown by all these letters and other mail matter that we are offering here, and which are just examples of great
78 quantities of similar mail matter that we have received in past years.

Mr. Wilfley: We object to that answer and ask that it be stricken out on the ground that it is a self-serving statement, conclusion and speculation of the witness. The papers referred to by the witness speak for themselves.

Mr. Matson: We offer the exhibits just referred to by the witness for the purpose stated by him and to show the facts he states, in addition to any other matters that the exhibits show under the pleadings in this case.

Witness: Plaintiff's Exhibits No. X-90 and X-91 are a letter and envelope. The envelope is addressed Stark Bros., on the inside as Stark Nurseries. This letter was request that we send a catalogue. Also shows the fact that the public looks on our company as the Stark Nurseries. We have advertised our address as Stark Nurseries, Louisiana, Mo., and we are known throughout the country as Stark Nurseries. Although our incorporate or legal name is Stark Brothers Nurseries & Orchards Company, we receive vast amounts of mail simply addressed to Stark Nurseries and in every other conceivable manner or combination of the words Stark and Nurseries.

Mr. Wilfley: We object to the exhibits as hearsay and to the comments of the witness as being absolutely incompetent, irrelevant and immaterial to any issue in this case and as not the best evidence.

Mr. Matson:

Q. I will ask you in connection with that answer, Mr. Stork, whether or not that mail matter so addressed as you state is all in existence or whether a part of it has been destroyed for past years?

A. We receive such a vast amount of mail matter that about every two years we find it necessary to go through and sort out and destroy a great deal of the mail matter, otherwise we could not possibly find any way to keep it stored, and a great deal of this mail matter we received of course has been destroyed the past year.

Q. Has a great deal of that mail matter addressed in the manner you have just spoken of been destroyed?

A. Yes, sir, a great deal of it. Furthermore, mail matter comes there addressed in every conceivable manner of using the combination of Stark—Nurseries and Missouri.

Mr. Pearson: We object because it is well known that the witness does not receive or open scarcely any of the mail that comes to this company, and that he does not know how the mail is addressed, and does not know what mail is lost or destroyed or has been destroyed, because as a matter of fact he does not destroy any of it except may be an occasional letter, and his testimony is purely conclusive, speculative and hearsay.

Witness: Here I have plaintiff's Exhibit No. X-92 addressed to Stark Bros., Louisiana, Mo., from Sam B. Gillett, of El Paso, Texas. This letter states that he ordered direct of our company, but did not order through an agent. He further goes on and explains
79 that he sent the order to Stark City instead of Louisiana. This letter and others in this bunch show plainly that these customers have sent their orders to Stark City and to the William P Stark Nurseries thinking that they were sending them to the original company, and when they write in to us about them many times we look up and find that we are unable to locate the order to try and adjust any complaint that may have been made by the sender, and when we write back and forth it finally comes down that the order was never sent to us, although the customer thought he was sending it to us. These letters show that condition.

Mr. Wilfley: We object to that, first as to the exhibit because it is hearsay, incompetent, irrelevant, and immaterial, next to the statements of the witness because they are self-serving, have no probative force, and it is a conclusion, speculation and argument on behalf of the witness.

Mr. Matson: The plaintiff particularly offers Exhibits X-80 to X-92, inclusive, to show the facts under the issues in this case just as testified to and stated by the witness.

Witness: I have here in my hand a batch of letters marked plaintiff's Exhibits Nos X-93 to X-112. This letter, Exhibit X-94, came in the envelope marked Exhibit X-93, and was addressed to Stark Bros. Nursery, Stark City, Mo., and down in the corner are the follow-

ing words: Formerly Louisiana, Mo. This letter is an example of many other similar letters showing that many persons think that the original Stark Brothers Nurseries have transferred their headquarters to Stark City, Missouri. Furthermore, the fact that we have used and broadly advertised the addresses for our company at Starkdale, Stark, Missouri, and Stark Station, Louisiana, Mo., show how easily the public is led to believe that this is the original Stark Nursery at Stark City.

Mr. Wilfley: We object to that answer and ask that it be stricken out for the reason that the exhibit is hearsay and that the answer and conclusions of the witness are self serving statements, have no probative force and are mere speculation on the part of the witness.

Witness: Mr. Wilfley, they are not speculation or theories, but they are facts, and we get a great quantity of letters similarly addressed continually.

Mr. Matson: We specially offer plaintiff's Exhibits Nos. X-93 to X-112, inclusive, for the purpose of showing the facts stated by the witness and the facts called for by the pleadings of the plaintiff.

Witness: Plaintiff's Exhibits Nos. X-95 and X-96 written by Mr. Frederick Stacell, of Neosho, Missouri, and which letter is addressed to The Stark Nursery Co., Louisiana, Mo., requests that we send one of our catalogues. It further states that he has sent to Neosho or would have to send to the head office, so he thought he would write to both places. This letter shows that even right down at Neosho, where the William P. Stark Nurseries are located, the public think
80 that it is the same company, and that the Neosho or Stark City plant is just a branch of the parent company at Louisiana, Missouri, and that they are all under the same management.

Mr. Wilfley: We object to that for the same reason stated before as to Exhibits X-93 and X-94.

Mr. Matson: And we offer those various exhibits for the same reason stated in offering the other exhibits, and for the additional reasons given by the witness.

Witness: I have here plaintiff's Exhibits Nos. X-99 and X-100, which are a letter and envelope received from W. O. Jackson, of Chanute, Kansas. This letter states, or rather asks the question if we (Stark Brothers, Louisiana, Missouri) are in any way connected with the Stark Brothers Nursery at Stark, Missouri. It further states that the writer of the letter saw in The Country Gentleman Weekly that Stark Brothers only have nurseries at Louisiana, Missouri, and in another place where Stark Brothers are located at Stark, Missouri This letter shows that the readers of The Country Gentleman and other publications confuse the two companies and are not sure as to the correct address. This man refers to both companies as Stark Brothers, one at Louisiana, Missouri, and the other at Stark, Missouri.

Mr. Wilfley: We object to that answer for the same reason given in our objection to the answer as to Exhibits X-93 and X-94.

Witness: Plaintiff's Exhibits No. X-101 and X-102 are a letter

and envelope. The envelope is addressed to Stark Bros. Nursery, Neosho, Missouri, Newton Co. The Neosho has been scratched out and Louisiana, Mo., written in. On the inside of the letter it mentions Stark's Branch Nursery, Neosho, Mo. This is another example showing that the public think that the William P. Stark Nurseries at Neosho and Stark City, Missouri, are just a branch of the original company.

Mr. Wilfley: We object to those exhibits and that answer for the same reasons given in our objection to the exhibits and answer X-93 and X-94.

Witness: I have here a letter from a large publication, Successful Farming, located at Des Moines, Iowa, plaintiff's Exhibit X-106. This envelope, Plaintiff's Exhibit X-105, is addressed to Wm. P. Stark Nurseries, Louisiana, Mo., and was delivered to our company, according to ruling of the United States Postal Department at Washington. On the inside of the letter it is addressed to Stark Nurseries, Louisiana, Mo., and refers to business which the original Stark Nurseries had been carrying on with this publication, Successful Farming. This letter is just an example showing that not only the ordinary farmers and average public get them mixed up, but here is one of the leading publishers of the country gets the two nurseries confused. And in addition to this I want to say that we have advertised extensively in this publication, and it is my understanding that the William P. Stark Nurseries have also advertised in it, and still Mr. Meredith, the publisher, gets the two mixed up.

81 Mr. Wilfley: We object to that for the same reason stated in objection to Exhibits X-93 and X-94, and for the further reason that there is no evidence in any of these exhibits that W. P. Stark had anything to do with any of the parties in the localities and places where these letters purport to have been written.

Witness: Plaintiff's Exhibit No. X-111 is addressed simply to Nurseryman, Stark, Mo., Pike County. This is just an example of many other similar letters showing that any combination of the words nursery and Stark is used in addressing to the original Stark Nurseries, which have been located here in Missouri for a hundred years. And furthermore, to my best knowledge and belief, there never had been another Stark Nursery anywhere in the United States until 1912, when the William P. Stark Nursery was started. Furthermore, we have featured in all of our advertising not Stark Brothers Nurseries & Orchards Company, but the words Stark Nurseries, Stark Trees is our trade-mark, and the way we get mail addressed similar to Exhibit No. X-111 shows that the public looks on our company as the Stark Nurseries. Plaintiff's Exhibit No. X-112 is addressed to Stark Bros. Nursery, and then shows question marks instead of a town, and then Missouri, showing on the face of this that the man knew that our company was located in Missouri, but he didn't know where. This letter, according to the habit of the postal employees, was delivered to us, as they had been in many past years.

Mr. Pearson: We object to Exhibit X-112 because it shows on its face that it is spurious and gotten up for a purpose, and not a genuine letter in any respect.

Witness: This Exhibit No. X-112 is postmarked Philadelphia, Ark., and was received by us in due course of business, was written absolutely voluntarily to the best of my knowledge and belief and was not trumped-up in any possible way.

Mr. Matson:

Q. Now, that ends those?
A. That ends those.

Mr. Wilfley: We make the further objection to the answer of the witness, and for the same reason that we gave in our objection to Exhibits X-93 and X-94, and for the further reason that it is hearsay, and we move that all his testimony concerning these Exhibits X-93 to X-112 be strickén out.

Witness: Plaintiff's Exhibits X-113 to X-129, inclusive, are a batch of letters from customers and prospective customers wanting to know if Stark Brothers and the William P. Stark Nurseries are connected or are the same company.

Mr. Matson. We offer in evidence whatever the letters show.

Mr. Wilfley: We object to that for the reason that the exhibits are hearsay, incompetent, irrelevant and immaterial to any issue in this case, and there is no evidence that they were written by the parties purporting to have written them, and there is no evidence that William P. Stark had anything to do with any of these parties, and the testimony of the witness is not of any probative force and the exhibits themselves are mere hearsay.

82 Witness: Plaintiff's Exhibits Nos. X-130 to X-148, inclusive, are letters and envelopes addressed to Stark Brothers, Stark City, Mo.

Mr. Matson:

Q. Well, they show that the letters and the envelopes were received in due course of mail by the Stark Bros. Nurseries & Orchards Company, is that true?
A. Yes, sir.

Mr. Wilfley: We object to the letters and envelopes for the reasons already assigned, and they are hearsay, and that there is no evidence of their having been written by persons who are in any way interested in the purchase of tree stock, they have not been properly identified to make them competent evidence, or that W. P. Stark had anything to do with them, or with any of the persons who purport to have signed these letters.

Witness: I have here plaintiff's Exhibits No. X-149 to X-164, which show on their face the manner in which mail coming to us has been addressed.

Mr. Wilfley: We renew our objection to these exhibits for the reasons assigned heretofore, to-wit, that they are hearsay, have not been properly identified to make them competent evidence, that there is no evidence of any connection between the parties who purport to have written these letters and W. P. Stark; there is no evidence of any

damage or injury, either to the plaintiff company or to the public or to anybody else, therefore they are incompetent, irrelevant and immaterial to any issue in this case, and the comment of the witness with reference to them is also hearsay and argumentative."

At the trial of the case counsel for defendant excepted to the ruling of the court in overruling its objections to the introduction of the exhibits and the testimony of this witness, set out in haec verba hereinabove.

Witness offers in evidence plaintiff's "Exhibits X-165 to X-187" collectively and separately. Counsel for defendant objects for the reason that these exhibits are not identified, and it does not appear for what purpose they are introduced, and that they are irrelevant and incompetent for any purpose in this case, foreign to all issues raised in the pleading, that they bear no dates, there is no showing as to what they are used for, or what was done with them. They are purely hearsay and are incompetent, irrelevant and immaterial to any issues in the case; which objection was made to the exhibits separately as they were taken up with the witness. Said objection having been overruled, counsel for defendant then and there duly excepted.

Witness testified that the "Exhibits X-165 to X-187" inclusive, were taken from the permanent files of the plaintiff Company, kept in the office in connection with its business, in which files the Company keeps a record of all publications gotten out by the Company. Counsel for defendant objected to this testimony for the reason that it is hearsay and it appears from the exhibits and testimony of the witness that they were gotten out or printed when the witness was
83 a mere baby, not old enough to take into consideration any purpose for which the exhibits were printed or photographed. Which objection having been overruled, counsel for defendant then and there duly excepted.

Witness testified that "Exhibits X-165" and "X-166" represented a price list and letter head used the past year by the plaintiff company. Witness testified in regard to "Exhibit X-165," "There is written at the top 1888 in my father's handwriting." Witness testified that this circular as well as the other circulars and publications in "Exhibits X-165 to X-187" were sent out in great quantities, running into the hundreds of thousands, to customers and prospective customers of plaintiff Company throughout the United States.

Witness produced plaintiff's "Exhibit X-167" as a field picture, showing the picture of W. P. Stark, C. M. Stark, father of witness, and Amy Stark, cousin of the witness, and in the background was a picture of witness. He thought the picture was taken prior to 1900.

Witness offered "Exhibit X-168," a picture taken many years ago and published in the catalogue gotten out by plaintiff Company.

Counsel for defendant objected to "Exhibit X-168" for the reason there is no evidence showing when this photograph was taken and by whom, and that it has not been sufficiently identified, which objection having been overruled, counsel for defendant then and there duly excepted.

Witness offered plaintiff's "Exhibits X-169 and X-170," pictures of the plaintiff plant at or near Louisiana, Missouri. Witness testified

that it could be seen from the C. & A. R. R., main line running from Chicago to Kansas City.

Counsel for defendant objected to the pictures as not having been identified, and as being incompetent, irrelevant and immaterial to any issues in the case; which objection having been overruled, defendant's counsel then and there duly excepted.

Witness offers plaintiff's "Exhibit X-172." Counsel for defendant objects to the pictures because the witness has not identified them and could not identify them over his testimony, because, according to his testimony, it was gotten out when he was a mere child. Which objection having been overruled, counsel for defendant then and there duly excepted.

Witness introduces "Exhibits X-173, 174 and 175" and testified they were gotten out while W. P. Stark was connected with plaintiff Company.

Witness offered in evidence plaintiff's "Exhibit X-176." Counsel for defendant objects to the exhibit for the reason it was not identified, and that the exhibit was such that witness could not identify it, and, therefore, his testimony concerning it was incompetent, irrelevant and immaterial, as being founded upon hearsay evidence, and a mere conclusion of the witness' interpretation of what the exhibit shows. Which objection having been overruled, counsel for
84 defendant then and there duly excepted. Witness testified that plaintiff's "Exhibit X-176" to the best of his knowledge and belief was gotten out about 1906.

Witness offered plaintiff's "Exhibit X-177," a fruit book gotten out about 1898, sent out by plaintiff company to customers and prospective customers. Witness identified in this exhibit a picture on a page which is seven pages from the back cover, which was a picture of witness taken when about three years old, or possibly four, about 1895; a picture also of his cousin, Martha Stark, daughter of E. W. Stark.

Witness tendered plaintiff's "Exhibit X-178." Counsel for defendant objected to the introduction of this exhibit because it was not properly identified, which objection having been overruled, counsel for defendant then and there duly excepted.

Witness produced plaintiff's "Exhibit X-179," which is a circular on the back of which is a map, and testified the circular was gotten out while W. P. Stark was connected with the plaintiff Company. Counsel for defendant objected to the introduction of this circular and the evidence for the reason that it has not been properly identified, and the comment of the witness concerning it is mere hearsay, *and the comment of the witness concerning it* for defendant then and there duly excepted. The same objection was made to plaintiff's "Exhibit X-180" and the same ruling.

Witness testified that the literature in the above exhibits was sent throughout the country. Counsel for defendant object to this testimony for the reason that it is hearsay, as much of it covered a period when witness was not connected with the company, and as witness was never in that department, his testimony was hearsay, which ob-

jection having been overruled, counsel for defendant then and there duly excepted.

Witness introduced plaintiff's "Exhibit X-181," on page 1 of which book is shown a picture of three generations of Stark families. Counsel for defendant objected to this exhibit as being incompetent, irrelevant and immaterial to any issue in the case, and as not having been properly identified to make it admissible in evidence, which objection having been overruled, counsel for defendant then and there duly excepted. Witness testified with reference — as follows:

"This book was sent out to thousands of people throughout the country. I remember when my father was working on it; I remember when it was published, and it is still used; some of our salesmen still ask for this book and still use it. In the front of this book is shown a picture of William P. Stark, treasurer of our company at that time. On page 5 is shown a picture of the various homes of the officers of the company. Up in the upper righthand corner is a picture with the wording 'residence of Treasurer, W. P. Stark, 14th and Georgia Sts., Louisiana.' On page 11 is shown a picture which reads 'Making Trees Bear.' In this picture are shown three children, the one on the left is my brother, Lloyd Stark, the one on the right is my sister, Luella Stark, and in the center is a picture of myself.
85 I remember distinctly when this picture was taken, seven years prior to the issuing of this book, at a time when I was about six years old. On the inside back cover of this book is shown a map in which is shown in large letters the word "Starkdale," where we maintained a branch plant, also is shown our other branch plants in large letters. In this connection I want to say that we have featured our branch nurseries on maps in various publications, even up as late as 1909, in a booklet price list gotten out by W. P. Stark while he was manager and treasurer of our company, and which is plaintiff's 'Exhibit X-183.' This plaintiff 'Exhibit X-183' that I have in my hand was mailed throughout the country to our customers and prospective customers. I remember distinctly when this large price-list was being issued and remember the work that was being done on it at the time I was home from college on my vacation."

Counsel for defendant objects to plaintiff's "Exhibit X-183" for the reason that it has not been sufficiently identified to make it competent as evidence in the case, which objection having been overruled, counsel for defendant then and there duly excepted.

Witness testified that this exhibit was gotten out under the personal supervision of W. P. Stark, and called attention to several excerpts from exhibit, to all of which counsel for defendant objected for the reason that the exhibit speaks for itself, and has not been sufficiently identified to make it competent in evidence, which objection having been overruled, defendant's counsel excepted then and there.

Witness produced plaintiff's "Exhibit X-182" and referred especially to pages 3 and 4, where reference is made to the "Delicious" apple, and testified this was gotten out in 1909, and that the exhibit was called "The Apple Stark Delicious." Witness testified that thousands of these were sent out to customers and prospective customers.

Counsel for defendant objected to this exhibit for the reason that

the exhibit was not sufficiently identified, that it is incompetent evidence, and for the further reason that there is nothing in the exhibit or any part thereof that is relevant or competent to any issue involved in this case, and for the further reason that all controversy with reference to the "Delicious" apple was settled by agreement in writing at Kansas City, Mo., October 16, 1914, which contract has already been introduced in evidence in connection with the deposition of Mr. E. W. Stark.

Witness called attention to a picture that was reproduced in this exhibit, of a box which shows the "Stark Method of Packing," on the end of the box is shown plaintiff's trade-mark, "Stark Trees."

Witness produced plaintiff's "Exhibit X-185," an advertisement gotten out in 1913, and called attention to the trade-mark, "Stark Trees."

Witness offered plaintiff's "Exhibit X-184" and testified that it was gotten out in 1910 under the personal supervision of W. P. Stark,
who was then treasurer and general manager of plaintiff com-
86 pany. Counsel for defendant object to the exhibit as incompetent, irrelevant and immaterial to any issue involved in this case. Counsel for plaintiff read from plaintiff's "Exhibit X-184" as follows:

"We are continually publishing booklets on subjects that hold the fruit grower and orchardist. At this time we have several comprehensive booklets, one of them being 'Orchard Cover Crops,' which is a reprint copyrighted paper, delivered by Mr. W. P. Stark before the Missouri State Board of Horticulture."

Counsel for defendant objects to that as incompetent, irrelevant and immaterial to any issue involved in the case, which objection having been overruled, counsel for defendant then and there duly excepted.

Witness offers plaintiff's "Exhibit X-186-187." Counsel for defendant objects to the introduction of these exhibits for the reason they are purely hearsay, and for the further reason that they are incompetent, irrelevant and immaterial to any issue involved in this case, and the latter has not been sufficiently identified to make it competent evidence in this case. Which objection having been overruled, defendant's counsel duly excepted. Witness testified that the letter was received in due course of business, was opened and read by the witness. Witness further testified, "I won't state definitely that I opened this letter, but I remember distinctly when it came into our office." Witness testified that it enclosed a clipping which is Plaintiff's "Exhibit X-187." Counsel for defendant objects to plaintiff's "Exhibit X-187" as not having been sufficiently identified to make it competent evidence, which objection having been overruled, counsel for defendant duly excepted.

Witness produced plaintiff's "Exhibit —" offered in connection with the deposition of E. W. Stark, being the Stark year-book for 1911, and called attention to page 15 of the said 1911 Stark year-book.

Witness offered in evidence what is designated as "W. P. Stark Trees and Their Fruit," plaintiff's "Exhibit X-188," and called at-

tention to certain pages of the book, especially pages 8, 19, 24, 41, 99 and 100.

On cross-examination witness, Paul C. Stark, testified as follows:

"Q. These exhibits that you have been testifying to, plaintiff's 'Exhibit X-165' that was gotten out in 1888, and 'Exhibit X-166' in 1892, and these pictures which you say were taken in 1890, '91 and '92, and these circulars beginning with plaintiff's 'Exhibit X-172,' down to and including plaintiff's 'Exhibit X-184,' were really gotten out before you had any connection with the company except your vacation connection?

A. Most of these exhibits referred to were gotten out prior to 1912, when I went into the employ of the company, but I was continually working at the office and at the nursery, and saw many of those in process of publication or being mailed out."

87 Witness stated that what he meant by continually was that he was working "in the nursery off and on during vacation and on Saturdays."

"Q. In your recent letter-head you have the picture of a number of Starks. Do you know why you have left out William Stark, your grandfather?

A. That letterhead was gotten up by my brother and I never saw it until it had all been designed and finished. I don't know why that was, no.

Q. Mr. Stark, in your direct testimony you referred to the branch nurseries in your various exhibits. The truth is you never had any branch nursery at Hamilton, Montana, did you?

A. We advertised a branch nursery while W. P. Stark was supervising—of my own knowledge, Mr. Wilfley, I don't know it.

Q. Well, don't you know that the plaintiff company never grew any trees at Hamilton, Montana?

A. I don't know it of my actual knowledge, no sir.

Q. Nor Twin Fall, Idaho?

A. I know we grew some trees out west there somewhere, but that was before I was continually connected with the company. That was about 1909 that that picture was gotten out.

Q. Nor Wenatchee, Washington?

A. I know that we grew some trees out west there, but I don't know what particular places.

Q. Well, don't you know that you never grew any trees at Atlantic, Iowa?

A. I don't know that one way or the other. I know that we advertised a branch plant and I thought we had. That was a good many years ago.

Q. These Exhibits X-67 to X-164, which you have been testifying to here today, consisting of letters, cards and envelopes, were not received by you from the mail carrier or from the post-office, as I understand your testimony?

A. Our mail is not delivered by mail carriers. It is put up in big sacks down in the post office and then comes out to our nursery in

that form, Mr. Wilfley, and the letters are sorted out by a number of girl clerks under the supervision of Miss Hunter.

Q. Mr. Stark, I hand you what purports to be a catalog of the William P. Stark Nurseries, which I have just gotten from you and which I will ask be marked defendant's "Exhibit A," and will ask you if you have seen this defendant's "Exhibit A" before?

A. I think this is a copy that was mailed to my uncle, E. W. Stark. It is postmarked Neosho. He received several catalogues and I think this is one of them. I am not sure.

Q. I wish you would turn to page 44 and read what is in heavy type at the left hand corner of that page?

A. Do you want me to read the whole page?

Q. No; just the left hand corner in heavy type.

88 Mr. Pearson: The lower left hand corner.

A. "No connection with any other concern." This is on page 44, down at the bottom of the page of defendant's Exhibit "A." "The William P. Stark Nurseries deal direct with the planters. We do not have agents, and we never have had agents; anyone representing himself to be our traveling agent is a fraud. The William P. Stark Nurseries is not connected or related in any way with any other nursery with similar name. We do business under the name of William P. Stark Nurseries, and no other."

Mr. Wilfley: We offer defendant's Exhibit "A" in evidence, and especially that portion of it which has just been read by the witness on page 44.

Mr. Matson: We object to that offer for reason that it is a self-serving statement published by William P. Stark Nurseries Company.

Mr. Wilfley:

Q. How long have you had this catalogue, defendants' Exhibit "A" in your possession, Mr. Stark?

A. I don't remember, Mr. Wilfley.

Q. Well, about how long?

A. I don't remember this particular book. As I told you, I don't remember exactly where we got that, although I think William P. Stark Nurseries mailed same to my uncle.

Q. To your uncle, E. W. Stark, president of the plaintiff corporation?

A. Yes, sir.

Q. How long have you known of this particular book?

A. This book?

Q. Yes.

A. I have known of it since shortly after it was issued.

Q. When was that?

A. I don't know. This says "Copyrighted 1915."

Q. Well, at least that was before this suit was instituted, then?

A. I think so, yes, sir.

Redirect examination.

By Mr. Matson:

Q. Counsel for defendants has called your attention to certain language published in defendants' Exhibit "A." I ask you to explain that, Mr. Stark, and explain your answer in connection with it.

Mr. Wilfley: We object to that. It needs no explanation. The exhibit speaks for itself.

A. This statement on page 44, from which I quote as follows: "We do not have agents, and we never have had agents; anyone representing himself to be our traveling agent is a fraud." that statement and the circular letters that the William P. Stark Nurseries sent out along the same line have caused a great deal of trouble and discouragement among our salesmen, because they go to their customers and are accused of being frauds and fakirs, and many of these salesmen have told me themselves that they have been greatly damaged and injured by these inferences that they were frauds.

89 Mr. Wilfley: We object to the answer as pure hearsay and a conclusion of the witness.

Witness: "We do business under the name William P. Stark Nurseries, and no other." That is quoted from this statement in the William P. Stark Nurseries book. This statement would leave the impression in the mind of the public that the William P. Stark Nurseries is the original Stark Nursery Company of Missouri, used in connection with other statements in this book. For instance, on page 73, from which I quote the following in the middle of the first paragraph. "none so well answered all requirements as did my old friend, William P. Stark, of Stark City, Missouri, who, having associated with his son, William H. Stark, 'a chip off the old block,' only more so, and with a great nursery located on ideal soil almost in the center of the United States, seemed to me the one firm above all others to spread the gospel of this wonderful peach to every corner of the earth where peaches can be grown. The name of Stark has for nearly a century been associated with the nursery business of America, and for the last quarter of a century William P. Stark has made the name a sort of trade-mark for big things in nursery work, and now with William P. Stark's great name and lifelong experience to direct affairs, and William H. to execute, the William P. Stark Nurseries are in better position than ever to continue and broaden the Stark Nursery business in Missouri at their Stark City plant."

Mr. Matson:

Q. Who wrote that statement?

A. That statement appears on page 73, and underneath it is the name "J. H. Hale." Furthermore, this statement was published by

the William P. Stark Nurseries in the fall of 1912, when they hadn't been in business more than six or seven months. In this statement it refers to this—"to continue and broaden the Stark Nursery business in Missouri at their Stark City plant." This is a plain attempt to make the public believe that these are the original Stark Nurseries of Missouri. And furthermore, it speaks of their Stark City plant. We have advertised for many years our large number of plants throughout the country, also in the Ozark Mountain region. In this book of William P. Stark's with various other places they mention the Ozark Mountain region, and it is right in line with the same literature that was gotten out by the Stark Nurseries—the original company at Louisiana, when William P. Stark was treasurer and general manager. Also on page 20 there is a picture showing W. P. Stark before an apple tree, and underneath the picture is the following wording: "The original Delicious Tree. The above shows W. P. Stark on a visit to S. L. Hiatt's home, East Peru, Iowa, where the original genuine Delicious apple tree stands today as hardy as an oak, bearing when others fail." This picture was published in this book after the agreement known as the Kansas City agreement, which has already been offered in connection with the testimony of E. W. Stark. This picture was run in this catalogue after that agreement with the William P. Stark
90 Nursery in respect to their contract or alleged contract for the budding of the original "Delicious" tree.

Mr. Pearson: We object to that statement for the reason that it is in direct opposition to the statement or original agreement concerning the "Delicious," which agreement bears the date of December, 1914, and it specifically excepts all matters that is at that time in course of being published, and that book was then in the publisher's hands, and perhaps published at that time.

Witness: This book was published in 1915, whereas the agreement was signed in 1914.

Mr. Pearson: But it was prepared before it was published.

Witness: Also in this book I notice on the back cover the picture of a tree with the word "Stark" in large red letters, and underneath the words "Stark City, Mo." In smaller letters on each side are William P. and Nurseries, and in this book at the top of each page is shown this same design featuring the word Stark in connection with a tree, when Stark Brothers Nurseries & Orchards Company as the original Stark Nurseries have been featuring Stark Nurseries and their trade-mark Stark Trees for many years. Also on page 35 I quote the following: "The Florence originated with the late Peter M. Gideon of Minnesota, who found it the hardiest of all, and was secured for propagation by William P. Stark twenty-eight years ago. It is the most valuable of all the crabs because the tree bears unusually young." This statement refers to the securing of the Florence crab many years ago when Stark Brothers introduced it. William P. Stark accompanied my father, C. M. Stark, on this trip, as is shown in the various parts of Stark Brothers literature, and it was my father, C. M. Stark, who had charge of

the selection of all new varieties and their propagation. In this book in various places the William P. Stark Nurseries refer to fruits and horticultural work that was done by William P. Stark, or was claimed to have been done by him, but it does not state that he was connected with the original Stark Nurseries Company, and he takes credit for doing these things himself when he was in the employ of our company, and all of these statements and claims lead the fruit growing public to believe that they are reading the catalogue of the original Stark Nurseries, because they have known for many years past from our literature and advertisements that Stark Brothers made these fruits popular and did the thing that William P. Stark claims he did personally.

Mr. Wilfley: We object to all that, of course, for the reason that it is mere hearsay, conclusions of the witness, incompetent, irrelevant and immaterial.

Mr. Matson: That is all.

(Signature waived.)

Mr. Remick: Plaintiff's depositions in chief are closed.

91 *Evidence Introduced by Defendants.*

W. P. STARK, called as a witness for the defendants, being under oath, testified as follows:

By Mr. Wilfley: State your name, please, Mr. Stark, age and address.

A. William P. Stark, age 55, Neosho, Missouri.

Q. What is your business?

A. I am a nurseryman.

Q. How long have you been engaged in that business?

A. Since I was twelve years old.

Q. Where?

A. At Louisiana, Missouri; until 1912.

Q. With what company?

A. Stark Brothers Nursery and Orchard Company.

Q. Just state briefly your connection with that company, Mr. Stark, not in detail, but from its organization, the early history of the company.

A. From boyhood I grew up in the business with my father and later there was a partnership business with my brothers, Clarence and Edgar, under the name of Stark and Company. We incorporated the business I think in 1889 with a capital stock of $50,000.00. About the year 1902 the capital stock was increased to $300,000.00 —no, in 1893 we increased the capital stock $300,000.00. In 1902 I think it was increased to $1,000,000.00.

Q. Of which there was the preferred and common issue of that stock——?

A. $500,000.00 in preferred stock, $500,000.00 in common stock.

Q. What was your official connection with that company, Mr. Stark?

A. I was the secretary and treasurer for many years and later I was treasurer and recognized as general manager.

Q. Well, as treasurer what were your duties, generally speaking?

A. I was—looked after the financial matters and general management of the business, the office work, sales and propagation and after my brother Clarence's health failed, I took over the president's work in addition and looked after the publicity and propagation in addition to the general management of the general business.

Q. When did Clarence M. Stark's health fail?

A. Well, his health was not robust for years and off and on, but he had a serious breakdown I think it was about the year of—early in the 1900's, about 1903 or four I think. He went to California for the winter.

Q. During your connection with that company from its inception as a corporation down to 1912, did you take any active interest in horticulture and nursery work throughout the country? If so, what?

A. Yes, I was. I took an active interest in the business in all of its branches; I attended various horticultural meetings and nurserymen's conventions, the American Association of Nurserymen, more or less the State Societies, keeping in touch with the horticul-
92 tural and nursery interests throughout the entire country.

Q. Did you occupy any official position with any of those organizations?

A. Why I served as trustee under Governor Folk and was elected president of the Missouri State Board of Horticulture for some years and I was also president of the American Association of Nurserymen. That is the national tree organization.

Q. Now, Mr. Stark, as general manager of this Stark Brothers' Nursery and Orchard Company, state whether or not it came under your supervision to observe the advertising of the merchandise sold by that company?

A. Yes, sir, that was one of my chief duties, to propagate and market the product.

Q. Mr. Stark, I will hand you exhibit marked page 2, Exhibit "A," which bears on the top "Stark Trees." I will ask you in what way that particular mark was used by the plaintiff company?

A. This mark "Stark Trees" was used to nail on boxes chiefly for the benefit of the railroads and steamboat lines so that in handling the freight they could at a glance see it was perishable freight and move it through. Now this mark here "Stark Trees bear fruit," was one of a good many marks they used there. This mark we began using there in the spring of 1897. My brother Clarence went to England in 1896 and came back with a number of ideas, among them this metal sign that we used, a white letter in a blue ground, and we began using that in the spring of 1897. Previous to that time and along in 1893 and thereabouts, we used a stencil cut out of metal. You would paint over it with a brush and make the mark.

Q. You say that was used on boxes containing trees. State

whether or not when trees had already been sold or whether they were packed for sale?

A. The trees were sold by ahe agents principally and when the order was received at the shipping time they were put in boxes and the small orders put in bales. Now we couldn't have nailed this mark to the bale because they were wrapped with straw and burlap.

Q. Well did those boxes contain any trees that hadn't been sold?

A. No, we had no consigning. We shipped out on orders that were sold in advance through the United States mail.

Q. Mr. E. W. Stark testified in his deposition that some times orders had been taken and the agents were unable to deliver the orders for the reason that the purchasers would not appear to receive them and the agents would then dispose of the trees. State how that was done.

A. Yes. Sometimes there was an order for which the deliveryman is unable to collect and quite often they find a good many orders that have been forged and those remnants are sold for whatever the collector can get out of them.

Q. Mr. Stark, state generally how the sales were conducted
93 by the plaintiff company while you were general manager of it.

A. The larger share of the business for many years was sold through tree agents who worked mostly on a commission contract, but there was also some catalogue, mail order trade through advertising.

Q. How many—what periods of delivery did you have for the sales made by the tree agents?

A. The fall and spring season.

Q. Then there were two general periods of delivery?

A. Yes, two seasons.

Q. And in the interim they would be taking these orders that you speak of?

A. Yes.

Q. Mr. Stark, I wish you would state whether or not any money was spent by the plaintiff company in advertising this sign "Stark Trees"?

A. No, we didn't spend any money on that mark there. That was used for a box mark but this "Stark trees bear fruit" was featured off and on and some other marks, including the registered trade-mark "Old Oak process trees."

Q. Well, were there any other marks that were used with the word "Stark"?

A. And this "Stark trees bear fruit" was used as a trade-mark but I don't think was ever registered while I was there.

Q. Well did they use words like "Stark Nurseries" and "Stark Brothers"?

A. Yes, we had infrequently a design "Stark Brothers and Stark Nurseries."

Q. Do you know whether or not they were used continuously any of them?

A. No, they were used off and on. For a number of years they were not used at all in the catalogues and publicity.

Q. Mr. Stark, did the Stark Brothers Nurseries and Orchard Company sell any other way than through these agents and through the mail orders you have spoken of?

A. That constituted their business.

Q. Now, Mr. Stark, there was some complaint manifest in Mr. E. W. Stark's deposition about a certain envelop marked Plaintiff's Exhibit "13." I will ask you just to state briefly to the court about that envelope.

A. I had a small quantity of these envelopes for my personal correspondence while I was president of the Board of Horticulture and vice president and president of the American Board of Association of Nurserymen, and president of the Missouri Horticultural College, and in looking after the duties I used this personal envelope as I didn't wish to use one advertising the business in writing official letters of that kind.

Q. Were there any considerable number of those envelopes used?

A. Oh no, just a small quantity.

Q. Now here is another exhibit I hand you, Mr. Stark, that
94 Mr. E. W. Stark referred to in his deposition. It is Plaintiff's Exhibit "9." Just state briefly about that exhibit.

A. This is "Orchard Cover Crops." It is the Bulletin which the Missouri State Board of Horticulture asked me to prepare on markets. It was recognized that Orchard Cover Crops, that is the legumes for seeding the trees and building up the soil and retaining its fertility, was one of the most vital questions to orchardists throughout the country, in fact not only the basis of fruit growers' prosperity but the basis of all agricultural productions, and on motion or resolution I was requested to prepare this Bulletin, which I did, and it became the property of the Missouri State Board of Horticulture which operates under the state law, and this Bulletin was used as a part of their circulating library for years and I judge is to-day. It was the property of the Missouri State Board.

A. (Continuing:) Later, Stark Brothers copied and also used the Bulletin. This is the Bulletin referred to at the start.

Q. Mr. Stark, in reference to the Delicious Apple. I will ask what connection you had with the Delicious Apple while you were with the plaintiff company? State briefly the history of that Delicious Apple. I don't care to have you go into detail, but just state briefly about it.

A. Well, Mr. Jesse Hyatt, the originator of the apple, wrote us about its introduction and sent some speciment apples. The first apple I cut and tested supplied the name "Delicious." At that time my brother Clarence was in Arkansas visiting the orchards and found some very valuable apples. I engaged in correspondence with Mr. Hyatt and we secured the scions.

Q. Was there any written contract about that apple as far as Stark Brothers Orchards and Nursery was concerned?

A. There was no written contract.

Q. Well, what was your arrangement about the scions that you speak of?

A. Mr. Hyatt wrote us he had the finest apple in all the world;

that his health was very precarious and he realized he soon must pass away; that he had gone to the nurserymen——

Mr. Matson (interrupting): Well now wait a minute, we object—have you got that correspondence?

A. How?

Mr. Matson: Have you that correspondence?

Mr. Wilfley: We haven't the correspondence, of course, Your Honor——

Mr. Matson (interrupting): Well I suggest——

The Court: Well, there should be some effort made if it is to be testified to, to procure the correspondence.

Mr. Wilfley: Well just leave out what Mr. Hyatt wrote; state what he said about it.

A. He sent us the scions.

Q. How long did he send those scions?

A. We had access to the original tree for five years.

95 Q. Do you know whether he sold the scions to other people after that date?

A. After the five years, scions were sold to nurserymen throughout the country.

Q. What effort did you make, Mr. Stark, when you were with the company with reference to the advertisement and sale of this Delicious Apple?

A. I used every publicity means to feature the Delicious and make it the greatest horticultural product of the age up to that time.

Q. Plaintiff's Exhibit "30," which is the apple, "Stark's Delicious,"—was that gotten out when you were with the company?

A. Yes, that was gotten out by my son-in-law, Mr. Wilson, under my direction.

Q. Did your company ever have any litigation over this trade-mark on the Delicious apple that was introduced in evidence here?

A. Yes, there was a suit brought against Wilds Brothers, Sarcoxie, Missouri, and Sulz Nursery and Orchard Company of Brussells, Calhoun County, Illinois, and on the advice of Judge Frederick W. Lehman of St. Louis, we withdrew the suit.

Mr. Matson: We object to that; it is not competent what advice—we don't object to the statements that they brought the suit while Mr. Stark was president of the company trying to hold the Delicious apple for this company.

The Court: I understand.

Mr. Matson: We don't object to that feature of it.

The Court: What was the result of the suit then?

A. The suit against Wild Brothers was withdrawn and the suit was lost in Calhoun County, Illinois, because this Delicious was a descriptive name, and, therefore, not a trade-mark.

The Court: I think there is no trade-mark about that; that has been my impression all the way through.

Mr. Wilfley: That is all I wanted, certainly.

The Court: I was just curious to know if the court held any trade-mark.

Mr. Remick: Well, Your Honor, it is in the record register of "Delicious"——

The Court (interrupting): I don't care what the register was, it was not a valid trade-mark.

Mr. Wiifley: The court so held in Illinois.

The Court: No doubt about that.

Mr. Matson: We don't any of us contend to the contrary but, beg pardon, your inquiry there was a source of personal information. I would like to suggest——

Q. (Interrupting.) Now, Mr. E. W. Stark testified in his deposition there was no other nursery in the world operated by anyone by the name of "Stark." Do you know whether that is true or not?

A. The Stark family are quite numerous and some of them are engaged in the nursery business. There was a man named
96 J. G. Stark has a nursery over here at Monett and a firm in Kentucky, Stark Company; had the same name we brothers had, Stark Brothers; and there is a man named Stark in Michigan in the nursery business and another nurseryman over in Kansas named Stark. I hear that name off and on a number of times during my business life.

Q. You don't know whether those were large nurseries or not or anything about them?

A. I have never been in their nurseries. Yes, and I will also state that Washington Stark, my uncle, had a nursery for some years in Pettis County, Missouri.

Q. Now, Mr. Stark, passing from that I want you to state briefly about Stark, Starkdale and Stark Station, which have been talked so much about in plaintiff's deposition.

A. Stark is a little country post office on the farm of J. O. Stark, five miles south of Louisiana; and there was a little country store there and for several crops we had some land rented there and grew some trees, but——

Q. (Interrupting): Is there such a post office as that, do you know?

A. No; that was discontinued when the rural mail service was adopted.

Q. Do you know about when that was?

A. Oh, I think it has been about fifteen or twenty years ago.

Q. What about Starkdale?

A. Starkdale was a flag station on the Burlington road, about twenty-two or twenty-three miles south of Louisiana. A flag station; for a short time there was a little store there and a post office which was abandoned after running a short time.

Q. How long since that was abandoned?

A. Oh, I expect that was along about 1902 or 1903. Our company had some land leased there from Field Estes.

Q. You had no office there or any——

A. (Interrupting): Oh, no, no office at Starkdale; no office at Stark.

Q. Simply used those names in your advertisements a——

A. (Interrupting): We used them there to show we were growing some trees at those places.

Q. And I suppose you continued to use them as an advertisement of your places growing fruit is that it, of your growing trees?

A. Yes.

Q. Well now how about Stark Station?

A. There never was such a place. There was a spur, a switch there at the packing house and in some advertising now that Stark Station was featured, or put in as a key to identify mail from certain advertisements, but there was no station or no town there, no post office there.

Q. That is you would put that in an advertisment, say in the Rural New Yorker, to indicate people answering that ad. Then you would trace it to that source of advertising?

97 A. Yes, just like we identify the returns from the post office box or an arbitrary street number, to trace the returns.

Q. Now, Mr. Stark, Mr. E. W. Stark has testified about friction in your company. I don't care to go into detail in the history of that, but I wish you would state briefly the friction and in testifying.

A. Yes, there was friction there and my orders were countermanded and my plans interfered with, the conduct of my financial business with the bank was interfered with, remittances, once to the amount of $35,000.00, was taken out of the United States mail after the mail had been deposited in the post office at the station, which was addressed to the National Bank of Commerce, St. Louis, and those remittances were held up; they were in payment of notes our company owed that were maturing and there were various resolutions put on the records threatening me and interfering with the conduct of the business, until finally before 1912 they took the mail away from me and deprived me of my official duties. The president had his board deprive me and my authority, also my son, and abrogate the terms, the right to fill our offices and the right to remove us.

Q. Well you say that continued along in 1911 and 1912?

A. Yes.

Q. And Mr. E. W. Stark has testified that you were not elected a director in 1911; is that correct?

A. That is correct.

Q. Mr. E. W. Stark testified you elected yourself a director in 1912 through your stockholdings in the company, but that the board refused and declined to elect you an officer of the company at the annual June meeting in 1912, is that correct?

A. Yes. I considered I was frozen out at that time.

Q. Well you had been practically notified you wouldn't be elected before, hadn't you?

A. I had been.

Mr. Matson: We object to going into all that matter, if your Honor, please.

Mr. Wilfley: I don't care to go into it. I just want to show he was eliminated because it has been gone into by the other side.

The Court: Well it appears in the testimony about that.

Q. What is your stock interest in the plaintiff company, Mr. Stark?

A. About three-tenths.

Q. Now you still own that stock in that company?

A. I do.

Q. You spoke about the capital stock being $500,000.00 preferred and $500,000.00 common. I will ask you whether or not during your connection with the company the dividends were regularly paid on the preferred stock?

A. The preferred dividends were always paid up until my freeze-out.

Q. Were there any dividends paid on the common stock while you were with the company?

A. Yes, sir. Several large dividends were paid.

Mr. Matson: Well now we object to that unless the record——

98 Mr. Wilfley (interrupting): Well we will withdraw it then. You know it has already been testified.

The Court: I don't really see why it is material, at least up to this point.

Mr. Wilfley: The only reason I wanted to show it was this witness rendered faithful service to that company all the time he was connected with that company. There has been some information he was trying to——

The Court (interrupting: Well I know, Mr. Wilfley, it is conceded here that he is an able, efficient man and all that. If there is anything that is contested it is the question of whether his services to the company were undivided or whether they were otherwise.

Mr. Wilfley: Yes, sir.

The Court: But as far as his ability is concerned, why I don't think that is contested at all.

Q. Mr. Stark, I will ask you whether or not you had any connection with any other company or nursery prior to the date that you were let out of office, during the time you were an officer of Stark Brothers Nursery Company up to the June meeting, 1912?

A. No.

Q. When did you begin business under your present name?

A. 1912.

Q. What season of 1912, what part of the year?

A. Well, we did no advertising and no general business until the spring of 1913, but we were doing some preparatory work the latter part of 1912.

Q. When did you move to Neosho?

A. The latter part of December, 1912.

Q. Up to that time you lived all of your life at Louisiana, Missouri?

A. Yes.

Q. You owned your home there and other property there besides an interest in Stark Brothers Nursery and Orchards?

A. Yes, I had other property there.

Q. State whether or not you had made any plans to go to Neosho prior to the time you were left out of office, out of the official family of the plaintiff company in Louisiana?

A. No, I considered I was anchored in Louisiana for life.

Q. Mr. Stark, there has been some testimony about the J. H. Hale peach. I will ask you when and under what circumstances you visited Mr. Hale with reference to this peach?

A. I was at Mr. Hale's place in September 1911.

Q. How did you come to go there?

A. For some years Mr. Hale had been telling me about this peach and that he wished me to introduce it for him.

Mr. Matson: Well now for the purposes of the objection, was that information conveyed to you by letters or personally?

A. Both.

Mr. Matson: Well then we object to that portion of it conveyed by letters unless the letters are introduced.

99 The Court: I don't suppose it is very important except to show he got in touch with Mr. Hale.

Mr. Wilfley: That is all.

Mr. Matson: Well, if that is all——

The Court (interrupting): Well now then, let me see what was done after that.

Q. State how you came to go there in September, 1911.

A. I went there on Mr. Hale's invitation.

Q. Have you the letter in which he invited you to attend, to visit him?

A. Yes, sir.

Q. Is that the letter which you hold in your hand?

A. Yes.

Q. That was received by you, was it?

A. Yes.

Q. Do you know Mr. Hale's signature?

A. Yes, that is Mr. Hale's letter.

Q. We desire to introduce this letter and have it marked defendants' Exhibit "A." I may say to Your Honor, without reading the letter, it is simply a letter to Mr. Stark from Mr. Hale insisting that he come at once, laying aside all excuses and so forth, and visit him with reference to this peach. About what time did you visit Mr. Hale in response to this letter, Defendants' Exhibit "A," Mr. Stark?

A. Along about the first week of September.

Q. When you returned to Louisiana, did you make a report to Mr. E. W. Stark?

A. Yes, sir.

Q. As to the result of your conference with Mr. Hale?

A. Yes, I did.

Q. What did you tell him?

Mr. Matson: Well now was that report made in writing? I know their business, the way they transact business in this firm is the reason I am asking that.

Q. Well if you you made it orally, state what you said to him; if you made it in writing——

A. (interrupting): I made my personal report to E. W. Stark and also to the son and then there was a general bulletin in addition to that.

Q. Have you that bulletin?

A. I don't know whether I have or not.

Q. Well what was your personal report? What did you tell him about it?

A. I told him I had secured the peach and gave him an outline of Mr. Hale's plans.

Q. Well, what were they?

A. Mr. Hale wished to give the greatest publicity and planting to the peach possible and he wanted to interest several nursery friends in addition to us, including Mr. McFarland, the publicity author, but the whole thing was to be under my direction in connection with Mr. Hale. At that time Mr. Hale thought it would be wise to have a separate company under my direction and I got him to let me have the buds which were under his—to be his property and under his control and direction awaiting the formation of this company that he contemplated. I first asked him to make a contract with our company and for personal reasons he declined. He said, "William P., I will not make a contract with your company, but I will make one with you"——

Mr. Matson (interrupting): Well now was that—we object to that conversation there with Hale.

Q. I will just ask if you didn't make this report to the Louisiana Company just as you are stating it here?

A. Yes, sir, I did.

Q. Please confine yourself, Mr. Stark, as to what was said by you to Mr. E. W. Stark, the president of the company.

A. I told him I had secured the buds and the conditions.

Q. Well, what did he say about that?

A. (continuing):—and how it was to be worked out and also explained in a general way about there would be a royalty and all that. He objected to Mr. Hale's plans and wired Mr. Hale that he repudiated any arrangements I might have made.

Mr. Matson: Well now we object to that unless the wire is in evidence.

A. He wrote Mr. Hale.

Q. Well, did he tell you he had wired Mr. Hale that he repudiated those arrangements?

A. He showed me the telegram and told me.

Q. Well what afterwards became of these buds?

A. The product was delivered to Mr. Hale.

Q. State what, if anything, you said to Mr. E. W. Stark about your personal interest in any Hale buds that were handled by the Louisiana company?

A. I explained to E. W. Stark the agreement and told him that I had arranged with Mr. Hale so that our company should have the preference and dominance in the company and if possible find a legitimate benefit, and that I personally did not wish to make one cent of profit from that arrangement.

Q. It has already been testified by Mr. E. W. Stark that you afterwards made a contract with Mr. Hale by which you were to handle this peach on a royalty; is that true?

A. Yes.

Q. And was the signature "J. H. Hale" trade-marked, or I mean copyrighted by you?

A. Yes. This is it (indicating).

The Court: All right. When was this contract?

Mr. Remick: July, 1913.

The Court: What is it?

Mr. Remick: July, 1913.

The Court: Well, that is, but I mean when was the contract with Mr. Hale made between Mr. Stark and Mr. Hale?

Q. When was this contract with Mr. Hale?

A. That was a year later.

The Court: In 1912, you mean?

A. Yes, sir.

Mr. Matson: Well now, we would like to have that contract in view of the matter—we think it will show it was made in June, 1912.

101 Mr. Wilfley: Well, we will admit it was made in June, 1912. You have a copy of the contract, haven't you?

Mr. Matson: I don't think we have. I don't know that we have. It was made while Mr. Stark was an officer of this company, completing this in June, 1912.

The Court: Well, I don't know what the fact is about that.

Mr. Matson: Well, that is why I asked about the contention of the contract, why we submit the contract should be produced.

The Court: I don't know when he ceased to be an officer. What date did you cease to be an officer of the plaintiff company, Mr. Stark?

A. I was removed from my duties and responsibilities and my mail taken away from me and practically discharged in the last of April, the spring of 1912. I was not elected the June following.

The Court: That is June, 1912?

A. Yes. But I had been deprived of my authority and rights and duties prior to that time.

Mr. Wilfley: We desire to introduce this trade-mark, Number 92478, issued by the Commissioner of Patents on the 25th day of February, 1913, the trade-mark, "J. H. Hale" signature.

Which trade-mark was duly marked and identified as defendants' Exhibit "B."

Mr. Wilfley: This is not quite chronological, but while I am on the Hale matter I want to dispose of this, Your Honor, while on the register, you will see it is a facsimile signature.

The Court: What is that? I can't hear it.

Mr. Remick: He says here is a facsimile of the signature of J. H. Hale. That is held to that one signature because it is a surname and it is not under the ten year proviso. Anyone can register a signature under the trade-mark law but confined to that one signature like "Kellogg" must keep his business name "Kellogg."

The Court: I don't see that that is of any importance.

Mr. Remick: Quite a little importance, Your Honor, it may develop later.

Mr. Wilfley: I might say in fairness to Mr. Remick's suggestion, I think it is of some importance because they used just as near to that signature as they could get to it, to using the same signature.

Mr. Matson: Well, we don't admit these various statements made by Wilfley.

Mr. Wilfley: Well, I am just making an explanation of the voluntary statement made by you.

The Court: Well, go ahead.

Q. Mr. Stark, here I hand you what purports to be a tag and ask you—with the signature "J. H. Hale" as displayed in the last copyright, defendant's Exhibit "B," and ask you if you used that tag in your business and on trees?

A. Yes, we used that label.

102 Mr. Wilfley: I desire to introduce that as defendants' Exhibit "C."

The Court: What is that? One of the regular tags they used in the business?

Mr. Wilfley: Yes, sir. It is the Hale signature.

The Court: Let me see that. (Tag handed to court.)

Q. Mr. Stark, I hand you a wooden label marked "Genuine J. H. Hale from Louisiana, Missouri," on one side, "Guaranteed by Stark Brothers, world's largest nurseries" on the other side, and ask if you have seen that before and where?

A. Yes, I have seen that a number of times.

Q. Do you know how it is used by the plaintiff company?

A. They use that as a label on the trees they send out on the name "J. H. Hale."

Q. We ask that be marked defendants' Exhibit "D."

Which exhibit was duly marked and identified as defendants' Exhibit "D."

Q. Now, Mr. Stark, there has been some advertising material introduced here in which there are advertisements from you, claiming the exclusive right to make use of this trade-marked signature "J. H.

Hale." You had those advertisements inserted in your catalogues and other advertising material?

A. Yes.

Mr. Wilfley: Now, if the court please, since the question has been raised about this J. H. Hale contract, I am perfectly willing to introduce it in evidence and I will introduce it in evidence, although I don't think it is of great force at this time, but I have no disposition to conceal it.

The Court: The only importance I can see to it is the question of whether it was made or not when he was under obligation to the other company. That is all.

The Court: Well, I understand. What is the date of that?

Mr. Matson: The 14th day of June, 1912.

The Court: When was your annual meeting, what date in June, of Stark Brothers' Nursery, if you remember?

A. It comes I think it is, about the third Tuesday, I think. That is my recollection.

Q. Do you know when you signed this Hale contract, whether you signed it before or afterwards, after that meeting? Do you recall anything about that, Mr. Stark, at this time?

A. I don't remember the date.

Q. Do you know whether you signed it before or after this date? Did Mr. Hale send the contract out to you?

A. These contracts were prepared by Mr. Hale and later they came out to my son for signature.

Mr. Wilfley: Now if the court please, I don't desire to read the contract. I am perfectly willing to go into it——

The Court (interrupting): No use reading it.

Mr. Wilfley (continuing): Except the contract shows that Mr. W. P. Stark is to pay Mr. Hale a very large royalty on these peaches and of course that is the reason why——

103 The Court (interrupting): Does he get exclusive rights?

Mr. Wilfley. Yes, sir, he gets exclusive rights, and while I have no objection to reading it, I simply would like, however, to substitute a copy of this contract.

The Court: Well, that may be allowed, Mr. Wilfley, in place of the original.

Mr. Matson: The contract is considered in evidence, I understand?

The Court: Yes, a copy may be substituted for the original.

EXHIBIT "E."

Copy of J. H. Hale Contract.

Articles of Agreement Made this 14th day of June, 1912, by and between John H. Hale, of the Town of Glastonbury, County of Hartford and State of Connecticut, and the J. H. Hale Company, a legal corporation organized under the laws of the State of Connecticut and having an office at said Glastonbury, parties of the first

part, and William P. Stark and William H. Stark, partners in business, both of the Town of Louisiana, County of Pike, and State of Missouri, parties of the second part.

Witnesseth:

That Whereas said John H. Hale is the originator and sole owner of the stock, trees and buds of a certain valuable yellow peach known and referred to as "Hale's new peach" and to be hereinafter known as the "J. H. Hale Peach," and is desirous of having the same propagated and distributed throughout the world through the best nursery channels.

And Whereas the said parties of the second part are desirous of propagating and distributing and selling trees bearing said "J. H. Hale peach."

Now Therefore, in consideration of the agreements each to the other hereinafter contained the said parties of the first part do hereby grant, assign and set over unto the parties of the second part the exclusive right and control of the propagation and sale of nursery trees of said peach for the term of ten (10) years from date hereof upon the following terms and conditions:

1. Said John H. Hale agrees to personally supervise the cutting from bearing trees of said "J. H. Hale Peach" all such propagating wood and buds as may be requested from time to time by said parties of the second part in such quantities as the said parties of the first part are able to supply.

2. Said parties of the first part also agree to furnish all information relating to the bearing, fruiting, carrying and shipping qualities of said "J. H. Hale Peach" and other information that may be necessary to the said parties of the second part in advertising and selling nursery trees of said peach and which is in possession of said parties of the first part.

104 3. The parties of the first part also agree to aid in preparing catalogues and other advertising matter in relation to said "J. H. Hale peach" so far as they may be able to do so, and also furnish from time to time from their bearing trees such samples of fruit as may be reasonably necessary to profitably place said "J. H. Hale peach" before the public in every legitimate way, and further to have their fruiting orchards open for full and free inspection of all customers of said parties of the second part who desire for their own information to see said "J. H. Hale peach" in fruiting, and the parties of the first part agree to aid in every reasonable way in the advertising, selling and distributing of said trees bearing said "J. H. Hale peach" without being obligated for any of the expenses of such work of advertising or distributing or to perform or be responsible for any of the business detail or work in connection with the advertising and distribution of said peach trees as herein provided.

4. Said John H. Hale does hereby grant to the parties of the second part the right and privilege to use the name "J. H. Hale" in

connection with the sale and distribution of nursery trees bearing said "J. H. Hale Peach" only, and also to furnish his autograph signature and grant the right to use the same in connection with the trade-mark label to be used upon all trees of this new peach that are sold or distributed under the terms of this contract, or in advertising and pushing the sale of said peach trees during the term of this contract; but said name "J. H. Hale" shall be used for no other purpose and the right to use the same shall continue only during the terms of this contract and as long as the same remains in full force and effect. At the expiration of said contract the right to use the name "J. H. Hale" or to have the autograph signature placed upon the labels, trade-mark or seals shall cease unless an additional term is granted in writing by the said John H. Hale.

5. Said parties of the second part agree to assume and take the entire responsibility for the propagation, distribution and sale of nursery trees bearing said "J. H. Hale peach" and to advertise the same fully in such agricultural and horticultural papers in America and such other papers and magazines as they may see best suited to encourage and increase the sale of trees of this variety of peach with profit and they also agree to fully describe, illustrate and advertise the said "J. H. Hale peach" and trees in all their catalogues and other publications issued in the interest of their general nursery trade, and agree to use every reasonable effort to push and increase the sales of said nursery trees and to establish a market therefor throughout America.

6. The parties of the second part further agree if it is deemed reasonable and profitable to do so to contract with such other nursery men or tree distributors as they may deem best for the sale and distribution of peach trees of this variety under such terms and conditions as they may from time to time prescribe, using their best endeavors in every possible way to widen the distribution and increase the total volume of sales of this variety of peach tree.

105 7. The said parties of the second part also agree to keep regular books showing the number of trees sold, the parties to whom sold and the price received for the same, and to furnish the said parties of the first part semi-annually on the first days of January and July in each year a full and complete statement showing such sales, the names of the purchasers, the post office address of same, and the amount charged and the amount received for the same, this list of the names of the customers, however, to be and remain the exclusive property of said parties of the second part and not to be used or disposed of by the said parties of the first part for any purpose whatsoever except for the purpose of collecting the payments hereinafter provided for under this contract.

8. The parties of the second part further agree that on the first days of January and July of each year when rendering the statement of the amount of sales to the parties of the first part they will pay John H. Hale fifteen per cent (15%) of the money received by them

from sales of trees of this variety by them up to the date of the account, and the said John H. Hale, or his representatives, shall have access at any reasonable time and a full opportunity to inspect the books, accounts, vouchers, receipts, or papers showing the amount of the sales of all trees made under this contract and the amount received for the same by the parties of the second part.

9. It is further agreed that if at any time during the term of this contract it shall be deemed wise and profitable to contract with any orchard growers for the planting of orchards on a share, royalty or other basis, said parties of the second part shall furnish trees necessary for such planting and receive eighty-five per cent (85%) of the returns accruing under such contract or contracts and the said John H. Hale shall receive fifteen per cent (15%) of the returns accruing under such contract or contracts and the payment thereunder shall be made at the same time and in the same manner as payments made for the sale of said nursery trees as hereinbefore provided.

In Witness Whereof the parties have hereunto set their hands and seals this 14th day of June, A. D. 1912.

JOHN H. HALE, [L. S.]
J. H. HALE COMPANY,
Parties of the First Part,
By JOHN H. HALE,
President Duly Authorized.
W. P. STARK, [L. S.]
W. H. STARK, [L. S.]
Parties of the Second Part.

Q. Mr. Stark, I will hand you now an envelope, "William P. Stark Nurseries, Orchard Experts, and General Nurserymen, Stark City, Missouri, U. S. A.," and ask you when, if at all, you began the use of that letter head?

A. Those were printed the latter part of 1912 or the early part of 1913.

Q. What, if any, was your purpose in having that particular design and color?

106 A. We endeavored to have a distinct style and lettering entirely different from anything that had been used by Stark Brothers. The color you will notice is also different from anything they are using or have used.

Mr. Wilfley: I desire to introduce that envelope and have it marked as defendants' Exhibit "F."

(*Copy of Envelope.*)

William P. Stark Nurseries,

Orchard Experts and General Nurserymen,

Stark City, Missouri,

U. S. A.

Q. Now, Mr. Stark, I hand you what purports to be three form letters on the letterhead of William P. Stark Nurseries, and I will ask you when that form of stationery was used by your company?

A. These letterheads were printed the latter part of 1912 or early in 1913, chiefly for the spring business in 1913.

Q. Well, did you have any other form of letter head for your stationery at that time?

A. This is the only form that we used at Stark City. We had proof of several kinds submitted and maybe a few dozen printed, but this is—was the main order.

Q. What, if any, purpose did you have in that design and color and the printing matter that is on that letterhead?

A. To make it absolutely clear and distinct, standing out boldly different from anything that Star Brothers used.

Q. I desire to introduce these three letterheads for the purpose only of showing the letterhead and the statement at the bottom, "We have no connection with any company of same name."

Mr. Matson: Let me see that.

Mr. Wilfley: The printed matter at the top is, "William P. Stark Nurseries, Orchard Experts and General Nurserymen, Stark City, Missouri, U. S. A. Nurseries at Stark City, Missouri. General offices and packing houses at Neosho.

EXHIBIT "G."

William P. Stark Nurseries,

Orchard Experts and General Nurserymen,

Stark City, Missouri,

U. S. A.

Nurseries at Stark City, Mo.	William Stark Trees direct at 50% of agents' prices. We employ no agents but sell direct to you by mail.	General offices & Packing Houses at Neosho, Mo.

(*Form Letter No.* 1.)

107 DEAR SIR:

I am pleased to have your inquiry, for I believe I can be of service to you, and that we can trade and both be glad of it. The new book "William P. Stark Trees and Their Fruits" is going to you to-day under separate cover. It lists all of the varieties that I have found through experience to be most practicable and profitable for either home or commercial orchard growing. I have given a great deal of thought to selecting the trees in this catalog, for I want my customers to be satisfied and to make money.

It costs no more to take care of a profit producing orchard than a losing one (often not as much). You'll spend just as much money cultivating and spraying worthless trees as those whose fruits command the highest market prices. So it pays to plant good trees at the start—it saves you years of time and increases your profits ten-fold. Another thing that's important. Plant the kind of trees that are best adapted to your particular soil, climate and markets. You will note in the book detailed descriptions of the different trees, their hardiness, habits of growth and little peculiarities, enabling you to choose those which are best suited to your region.

I should be very glad to help you with information about any trees you buy from me. I am personally acquainted with a number of the orchard regions of your state, and am familiar with others through dealing with old customers. Tell me about your soil and location—write me just as freely as you desire and I will give your letter my personal attention.

I save you 50% agent's commissions by dealing direct.

We employ no agents. An agent gets one-third to one-half of the money you pay him for trees. You are not always sure the trees you get are the ones you ordered—you won't know for four or five years after you've planted them. In buying William P. Stark trees you secure reliable, selected trees, proved and tested, hardy, strong-rooted, vigorous, free from insects or diseases, and guaranteed true to name by a guarantee that really protects you. In addition, you save one-half your tree-money. You deal direct. You have the advan-

tage of securing practical, valuable information and help when you need it from some one who knows. By dealing with our customers direct, by giving closest attention to details, and by reason of our ideal Ozark mountain soil, we not only furnish you better trees, but at lower cost than inferior trees would cost you bought through agents.

You will be interested in the "J. H. Hale" peach. There have been a number of articles and descriptions of it in such magazines as the Country Gentleman, the Rural New Yorker, and the Fruit Grower for the last several years, but this is the first season Mr. Hale has had the variety grown for distribution. Mr. Hale, known as the "Peach King," has experimented with hundreds of varieties. When he first found this peach it seemed almost too good to be true. He had seen lots of seedling trees that were very promising, but they did not live up to their promise when they were propagated and grown under other conditions. So he planted some thousands of
108 these in his Connecticut and Georgia orchards, and has been fruiting them under all kinds of conditions for the past eight years. I have hundreds of letters written Mr. Hale about his peach, but he would not send it out until he was satisfied it was all he claimed for it; the best peach in America.

The following shows how thoroughly Mr. Hale tested the variety: "Finally realizing the great value of such a peach as this, if it should show the same points of value after general propagation as it did on the original tree, I determined to test it out thoroughly in my own orchards, north and south, and so propagated 3,000 trees, planting here in Connecticut 1,000 on a sandy loam with sand subsoil, and 1,000 on heavy black loam with yellow clay sub-soil, while another 1,000 went to Georgia and were planted on a brown, sandy, loamy soil with a red clay sub-soil, as great a diversity for peach growing as can be found in any section of America where peaches are grown, and yet this peach, both in tree and fruit, has come to an equally perfect state of development on all three, showing wonderful adaptability to varied soils and climatic conditions." You will find the rest of Mr. Hale's description in the catalog which we are sending you.

No fruit in the history of American horticulture has been so thoroughly tried out and proven before being offered to the fruit growers as has the "J. H. Hale" peach. Contrary to the usual practice, you can get a better peach than any you are now growing and be among the first to have an orchard of this variety, and at the same time be sure of getting a variety that has been tried and proven successful. There is no uncertainty about it. It has been tested on the market. It has been shipped in the same car with Elberta and other varieties, and has proven a better shipper in every instance. It is better quality, is more beautiful even than Elberta. One-third to one-half larger, more productive, rounder, and a better packing peach. It blooms three to five days later in the spring than Elberta and will stand a great deal more cold. In the 150-acre orchard of Mr. Hale's in Connecticut he has such varieties as Elberta, Georgia Belle, Hill's Chili, Carman, Fox and "J. H. Hale." The fruit buds

on all the varieties were killed by the 25 to 30 degrees below zero except the "J. H. Hale," which bore a moderate crop.

In planting the "J. H. Hale" you will plant a better commercial peach than Elberta. A better quality and more beautiful peach than any of the old time favorites. A peach that has shown greater hardiness in wood and bud than the Elberta, Georgia Belle, Carman, etc. You cannot afford to miss an opportunity like this. Plant now and have one of the first orchards of the "J. H. Hale" in your section. Have a monopoly on the market of the highest and best quality peach. It is a certainty. It has been proven. You can be sure of it. Don't wait, but write now, so that I may reserve the trees for you. We are the only ones who are growing the "J. H. Hale." We have an exclusive contract with Mr. Hale. I will take pleasure in giving your order careful and personal attention.

Very truly yours,

(Signed) W. P. STARK.

Missouri. William Stark. Please deduct 50 per cent on agents' prices. We employ no agents but sell direct to you by mail."

Mr. Matson: The last exhibits, what are they?

Mr. Wilfley: I don't know as it it necessary to introduce more than one of them because I am simply introducing them for the purpose of showing——

The Court (interrupting): I think if that statement be it was simply literature universally used at that time, it doesn't seem to me that more than one copy is necessary. That should be sufficient.

Q. Mr. Stark, I will ask you whether or not you had occasion to use any considerable amount of that stationery?

A. Yes, we used a large number of these letterheads and envelopes.

Q. Did you have any agents in your business?

A. No.

Q. Have you ever had any agents?

A. No, we sell direct through catalogue and mail.

Q. Therefore, you conduct the greater part of your business by correspondence and through mail?

A. Yes, sir, practically all correspondence through the United States mail.

Q. Now, Mr. Stark, your catalogue was gotten out in 1912 and 1913, has already been introduced in evidence as Plaintiff's Exhibit "14," so we will not introduce that catalogue for that year. Now, Mr. Stark, I will ask you if you had occasion to continue that same form of letter head and with the same printing at the bottom and fall of 1913 and the spring of 1914?

A. Yes, we continued this same form.

Q. Your catalogue for 1913 and 1914 has already been introduced in evidence, so it isn't necessary to introduce the catalogue for that year. We now come to the question of the letter which was issued by your company referring to agents representing themselves as your

agents. I don't find the number of that exhibit, but I am sure Your Honor is familiar with the letter which was issued in which the reference is made to people representing themselves as our agents. Mr. Stark, what was the occasion for your issuance of that letter?

A. We had numerous complaints that agents were claiming to represent us and sell our J. H. Hale peach and other trees. These complaints came from various parts of the country.

Q. Well, was it confined to any particular nursery or any particular locality?

A. Various nurseries, including Stark Brothers.

110 Q. I hand you a letter dated "Carthage, Missouri, March 2, 1914," and ask you if that was the letter you received?

A. Yes, we received this letter from R. F. Glynn at Carthage.

Q. Did you receive other letters of similar purport to that?

A. A great many.

Q. What has become of them?

A. Why, they went into the files——

Mr. Matson (interrupting): Now we object to that statement.

The Court: Why he has a right to state what became of his letters.

Mr. Matson: Yes, sir, that is all true, too, but he hasn't stated that and there is no proof of the genuineness of this letter and no reason why the parties who wrote it can not come here. A lot of self-serving statements in this letter.

The Court: How does that differ from those in Mr. Paul Stark's deposition?

Mr. Matson: It doesn't differ at all except this, if the court rules against one we want the same ruling against both of them.

The Court: Oh, very well.

Mr. Matson: Just self protection about both of them.

Mr. Wilfley: Mr. Matson's suggestion is well taken. If he makes that objection we will not offer the letter because it is——

The Court (interrupting): Very well.

Q. Now, Mr. Stark, we come to the years 1914 and 1915, that is the fall of 1914 and 1915 and the catalogue for that year was not introduced by plaintiff in this case—possibly that one was, I guess it is the next one—well I guess that catalogue has been introduced by plaintiff so we will not introduce that one.

Mr. Matson: What year is that, Mr. Wilfley?

Mr. Wilfley: 1914 and 1915.

Q. Mr. Stark, I hand you what purports to be William P. Stark 1914 Fall Bulletin, and ask you if that was a piece of advertising that was gotten out by your company?

A. Yes, this Bulletin was published in the fall of 1914.

Q. We desire to have that identified and marked by the stenographer as Defendants' Exhibit "H."

Which Bulletin was duly marked and identified as Exhibit "H."

Q. State whether or not you had occasion to send out any number of these Bulletins?

A. We mailed a large number of these Bulletins.

Q. State whether or not that was one of your chief pieces of advertising at that time.

A. That was our main Bulletin for fall mailing as the new catalogue was not ready and we sent out a very large number.

Q. Mr. Stark, I will ask that this be introduced in evidence. It has already been marked Exhibit "H." There is no objection is there?

Mr. Remick: None at all.

Q. I will ask you if all the bulletins that were sent out in this form bore this sentence: "Be sure to put this address on your letter; we have no connection with any other concern of similar name"?

111

A. Yes, that went on all of them as they were all printed from the same electro form.

Q. I will hand you "William Stark's Special Bulletin" and ask you when that was written?

A. This bulletin was mailed in the spring of 1915. A large number of these were mailed.

Q. I desire to have that marked Defendants' Exhibit "I."

Which bulletin was duly marked and identified as Exhibit "I."

Q. Mr. Stark, I will ask you whether or not you used during the season of 1914 the same letterhead which you had testified to as a large portion of your mail?

A. Yes, this is the same letterhead.

Q. Mr. Stark, referring to Defendants' Exhibit "I" I will ask you—which you have testified was a bulletin which was issued in the spring of 1915,—I will ask you if you sent out a considerable number of these bulletins?

A. A very large number.

The Court: Is that the spring of 1915?

Mr. Wilfley: The spring of 1915.

Q. I will ask whether or not they all contained on the front page: "We have no connection with any other concern of similar name"?

A. That statement was printed on the bulletins and they were all printed on the same electro form.

Q. Mr. Stark, I will hand you what purports to be a letter from the Post Office Department of Washington signed by W. H. Lamar, solicitor, and ask you if you received that letter along about March, 1915?

A. Yes, we received this letter.

Mr. Matson: Let me see that will you, Mr. Wilfley?

Mr. Wilfley: Just one minute.

Which letter was marked and identified as Exhibit "J."

Mr. Matson: I presume, Mr. Wilfley, you are not offering what is written on the back of that letter?

Mr. Wilfley: I didn't read what was on the back of it. We are not. We are simply offering what is written on the front (Examining letter). The back doesn't seem to bear signature and I don't care to take up time to read it. This is simply a letter in reference to items testified to by Mr. E. W. Stark; get mail addressed to Stark City by the Louisiana company and it is only put in for that purpose.

Mr. Matson: Your Honor is going to take that statement as it is? Our company, on account of the innumerable letters that were sent to Stark City that our company was entitled to, undertook to rent a box or get someone there to look after the style of mail sent to Stark City entitled to our company, that should be sent to our company. That is the object we had in making that effort before the Post Office Department, not an attempt to procure anybody else's mail.

Mr. Wilfley: The letter speaks for itself as to whether or
112 not you made any attempts to secure any one else's mail.

Q. Mr. Stark, I understand from the testimony which has been given there were some form letters which you sent out in 1914 which did not have the wording at the bottom, "We are not connected with any other company of similar name"; why was that form used, do you know?

A. We used that form "No connection" on all our stationery for, I think, several seasons until the statement went into the bulletins and catalogues and then we omitted it from one order of letterheads in order to get an inch and a half more space for the letter matter, but we always carried a notice of that kind.

Q. Now, Mr. Stark, we come to the fall of 1915 and the spring of 1916 and a catalogue for that year, plaintiffs have—issued by your companies—plaintiffs have filed, introduced. I will hand you what purports to be a catalogue of that year.

The Court: 1916?

Mr. Wilfley: 1915-1916.

Q. And I will ask you if that was a catalogue issued by your company that year?

A. Yes.

Q. (To reporter:) Please mark that Defendants' Exhibit "K."

Which exhibit was duly marked and identified as Defendants' Exhibit "K."

Q. We desire to introduce this catalogue in evidence and I will ask you to read from the 44th page of Defendants' Exhibit "K" just handed to the court, just passed to the court.

The Court: You want attention called particularly to page 44?

Mr. Wilfley: Yes, sir.

Mr. Matson: That exhibit is the same as the exhibit introduced in the cross-examination of Mr. Paul Stark and is in Mr. Paul Stark's deposition. The intimation has been made that we for some reason didn't introduce it, but it is in the testimony of Mr. Paul Stark.

Mr. Wilfley: I know, we introduced it. They didn't introduce it. The record will show that; the record speaks for itself.

Q. That is the regular catalogue you got out there?
A. Yes.

Mr. Matson: What year is that, Mr. Wilfley?
Mr. Wilfley: 1915-1916.
Mr. Matson: Thank you.
Mr. Wilfley: If the court please, there was a letter introduced in evidence yesterday that was written to me by Mr. E. W. Stark. I asked that my answer to that letter be produced and the plaintiffs had it misplaced. I would like at this time to introduce a carbon copy, if they would consent to it.
Mr. Watson: If you say this is a carbon copy. Along with this letter that we introduced in evidence is another exhibit showing that the letter that we wrote to Mr. Wilfley, a copy of it was sent to the defendants in this case.
113 The Court: Well I understand that.
Mr. Wilfley: The letter is only in general terms and we will admit that the defendants got a copy of it, for that matter.
The Court: Very well.
Mr. Wilfley: I would like to have this marked Defendants' Exhibit "L." This is introduced in evidence, Defendants' Exhibit "L."

EXHIBIT "L."

January 31st, 1916.

Stark Bros. Nurseries & Orchards Co., Louisiana, Missouri

GENTLEMEN:

I have just returned to the City after an absence of three weeks in Florida and Texas and find yours of the 15th inst. concerning the William P. Stark Nurseries Company.

I have not seen Mr. William P. Stark, or any member of his Company for several months. Your letter does not specify your complaint I do not know what methods you term "unfair" nor the statements which you construe as "misleading and untrue." Therefore, I am not in a position to make a definite reply to your letter, nor am I in a position to advise with the William P. Stark Nurseries Company concerning the matter, even though they should ask my advice in the premises.

I had hoped that there would be no further friction between the Companies and very much regret that you have occasion to make complaint.

Yours Very truly,
(Signed) XENOPHON P WILFLEY.

Enclosure.

XPW/AD

Q. Now, Mr. Stark, there was introduced in evidence here yesterday a letter, or a carbon copy of a letter addressed to you in August or September, 1916, just prior to the time this suit was brought. I will ask you if since that time you have used in your catalogues which have been published since that time advertising material, the mark which is complained of in this suit?

A. No, we have not.

Q. Well do you know whether you used any tags with that mark on them or not?

A. There may have been a few remnants left over from the previous spring and were used, before the new order was printed, possibly a very few.

Q. You have no tags printed since that time?

A. No, no reprints

Q Now I hand you, Mr. Stark, what purports to be your catalogue gotten out for 1916 and 1917 and ask you to identify that?

A. This is our catalogue for 1917.

114 Q. That was gotten out in the fall of 1916 and 1917?

The Court: Was it—is that the one you——

Mr Matson (interrupting): Yes, the fall of 1917.

Mr. Wilfley: Yes, well that is just the way the others have been. This follows other catalogues that have been introduced?

A. Yes.

The Court: When was this suit brought?

Mr. Remick: September, 1916.

Mr. Wilfley: It was brought September, 1916.

Q. Mr. Stark, I will ask you if you ever received any letter or any specific objection to the use of this mark prior to the time that you received the letter which was about August or September, 1916, shortly prior to the time this suit was brought?

A. No.

Mr Wilfley: I desire to introduce this catalogue and call the court's special attention to the—Mr. Stark, I hand you what purports to be a bulletin issued by your company in the spring of 1917, and ask you if your company issued that bulletin?

A. Yes.

Mr. Matson: Mr. Wilfley, I don't think you have your 1917 catalogue marked as an exhibit.

Mr. Wilfley: We desire to introduce that catalogue of 1916. That was the only catalogue you issued during that time, wasn't it?

A. Yes, sir, that is the only catalogue.

Said catalogue was marked and identified as Defendants' Exhibit "M."

Mr. Wilfley: I desire to introduce this bulletin marked Defendants' Exhibit "N" and call the court's attention at this time to the bottom of page 3.

The Court: What is this bulletin?

Mr. Wilfley: That is a bulletin issued in the spring of 1917. It is the general purport of the bulletin which was issued the year before, which has already been introduced in evidence.

Q. Did you have occasion to send out a considerable number of the bulletins?

A. Yes, sir, mailed a large number of the bulletins.

Q. Now, Mr. Stark, what significance did you attach to this mark which plaintiff is complaining of here and which was on a number of your catalogues advertising material, "William P. Stark Nurseries and Stark Trees, and Stark City, and so forth?"

A. Our catalogue printers, Rogers and Company, had our orders to design that as an ornament at the top of the page.

Q. State whether or not you ever treated it as a trade-mark or used it?

A. No, never.

Q. Mr. Stark, there has been considerable said here about the Kansas City agreements of October 16, 1914. I will ask you to state in a general way whether anything was said at that conference about any infringement of a trade-mark or unfair competition or any complaint made in the settlement?

A. There was not.

Mr. Matson: Now wait a minute, we object to that unless Mr. Stark is confined to some one who was talking to Mr. Stark at
115 that time, connected with the complainant company, and not what some—his idea of what somebody else might have said to him.

The Court: Why I think in a matter of that kind any statements by attorneys should be included.

Mr. Matson: Yes, sir, but then not by the attorney for the complainant. He might have gotten some information from somebody else at the time but not from the complainants or their attorney, or from the president of the complainant, either one. There would be some question of whether—neither one of them had anything to say to Mr. Stark at all along the lines that were there, but talked to his attorney.

The Court: I say that he may state whether anything was said either by any representative of Stark Brothers Company, the plaintiff company, or its attorneys.

Mr. Matson: Yes.

A. There was no such talk.

Q. That contract which has already been introduced in evidence here was entered into for the purpose of compromising and settling all differences between the companies at that time wasn't it?

A. Yes.

Mr. Matson: We object to that contract, it speaks for itself as to what it was for.

The Court: Well——

Mr. Wilfley (interrupting): Now, Mr. Stark, I hand you what purports to be a centennial list of the fall of 1915 and the spring of 1916, issued by Stark Brothers Nurseries and Orchards Company, Louisiana, Missouri, and ask if you received that through the mail?

A. Yes.

Mr. Wilfley: I desire to have that marked defendants' Exhibit "O." Is there any objection to this being introduced?

Mr. Matson: No, sir.

Mr. Wilfley: We desire to introduce this exhibit in evidence and call the court's special attention to the seal, "Stark Tree bear," the picture of a bear and the statement, "No tree is a genuine Stark tree unless this seal is attached."

I next desire to introduce in evidence a copy of plaintiff's trade-mark of the bear "Stark trees bear fruit" on it. There is no objection to that being introduced? I call the court's attention to the sentence where it is marked with the pencil.

The Court: What is it?

Mr. Wilfley: I call the court's attention at this time to the sentence we have underscored, that is our underscoring and not an underscoring of the department.

Mr. Remick: If Your Honor please, there is only about three trade-marks so far have been shown to be used by the million dollar corporation.

The Court: What is that?

Mr. Remick: There has so far been shown only about three trade-marks, or maybe four, used by this great corporation. So
116 I don't see why that has any bearing on the case. It is of not any serious significance on that size corporation. Some corporations do business all over the world, have many trade-marks.

Mr. Wilfley: We will get to that in the argument. I don't care to argue the case at this time. I think it has significance. I desire to introduce a circular letter gotten out by Stark Brothers Nurseries and Orchards Company.

The Court: Is that the trade-mark in suit here on this exhibit?

Mr. Wilfley: Not on this one.

Mr. Remick: No, sir, that is not an issue.

The Court: I say the trade-mark in suit is among these exhibits, isn't it? You have been leaving them over there. It was there yesterday, if that is the same one.

Mr. Remick: Defendants' trade-mark, yes, sir.

Mr. Wilfley: You mean defendants' trade-mark?

The Court: No, no, I didn't know defendants had a trade-mark.

Mr. Wilfley: No, you are speaking about the——

The Court (interrupting): Plaintiff's trade-mark in suit. Isn't that it right there? What is that?

Mr. Remick: The trade-mark of Stark Trees, Your Honor.

Mr. Matson: We had three or four different labels.

Mr. Wilfley: They are around here somewhere.

Mr. Remick: Your Honor, there is one in the first pile of your exhibits up there.

The Court: Oh, no, but I want to see the certificate of trade-mark. I want to see what the claim was made.

Mr. Wilfley: I will introduce defendants' Exhibit "Q."

The Court: What is the date of this?

Mr. Wilfley: I don't know whether that bears a date or not.

Mr. Matson: We call attention to this paragraph in here (indicating to court).

The Court: Yes, I know but that is significant only if I know the date. It hasn't any significance unless I know the date.

Q. Have you received that—was that gotten out while you were with the company, *St.* Stark, or since you left the company?

A. No, this came in the spring of 1916.

The Court: Very well.

Mr. Wilfley: I desire now to introduce the envelope bearing the trade-mark "Stark trees bear fruit" and the letterhead of Stark Brothers Nurseries and Orchards Company.

Which exhibit was duly marked and identified as Exhibit "R."

Mr. Wilfley: You may take the witness. I think that is all.

Cross-examination.

By Mr. Matson:

Q. Mr. Stark, you were in the court room all day yesterday while the depositions were being read and the exhibits being offered were you not?

A. Yes, I think so.

117 Q. You heard the exhibits that were offered of your year-books of prior years, to which you have offered them this morning, or your attorneys have offered them, did you not?

A. I was present.

—. Did you see those books?

A. No, I was back in the rear.

Q. Now if you will get those different exhibits, I will hand them right to him and ask him. Mr. Wilfley have you got the books purporting to be issued by the defendant in this case?

The Court: Yes, it was stated as having been introduced by the other side. He did not introduce them this morning.

Mr. Matson: He didn't say he would admit. You admit this publication in the various journals here was caused to be published by the defendant company?

Mr. Wilfley: Some of them were I know. I don't remember the various ones. Some I don't think have been properly identified, as I said to your Honor. Some of them were, we admitted, in the record. That all shown yesterday, as to whether or not we admitted them, some we made no objection to; some we did object to because the full publications were——

The Court (interrupting): Yes, I didn't keep track of that objection especially, because mostly it was in the deposition and sometimes nothing was said. I don't really recall how many of them

were objected to. There was one or two. The only one I remember specifically was that one about the J. H. Hale peach. There was a full page there was inserted. It was signed J. H. Hale. It had what I see now is this patented signature.

Mr. Matson: We introduce copies of the "Country Gentleman," of the "Rural New Yorker" and the "Fruit Grower" containing advertisements purporting to have been inserted by the defendant company, and your Honor will recall that some question was raised that they hadn't paid for them, hadn't caused them to be inserted, Mr. Remick remarked he presumed they were and you said you weren't acting upon presumptions.

The Court: I said that only with respect to the Hale advertisement where it appeared on the face to be an advertisement, William P. Stark's advertisement, and he said he presumed. This one particular thing you may ask him about if you want to. I think there is enough in there to show the publication.

Mr. Wilfley: Both publications will show on their face they were inserted by the William P. Stark Nurseries Company and we admit it, were paid for by the William P. Stark Nurseries Company.

Q. Mr. Stark, I show you plaintiff's Exhibit "14," which purports to be William P. Stark Trees and Fruits and ask you what you know about that catalogue, or know of that exhibit?

A. This is our catalogue for 1913.

Q. I show you plaintiff's Exhibit "15" and ask you the same question concerning that exhibit?

A. This is catalogue for 1914.

118 Q. Now isn't Exhibit No. "14," Mr. Stark, wasn't that copyrighted in 1912 and you say it is a catalogue for 1913?

A. Well, we usually print them a little ahead of time so as to have ready on time.

Q. And the same applied to plaintiff's Exhibit No. "15," you say it was not a catalogue for 1914? That was copyrighted and had been published in 1913?

A. The printing—the printing is done ahead of time so as to have them ready on time.

Q. Well, you have these catalogues copyrighted, haven't you?

A. Yes.

Q. And those are the years in which they were copyrighted?

A. Yes.

Q. Now I show you plaintiff's Exhibit No. "16" and ask you what you know of that exhibit?

A. This is a catalogue for 1916.

Q. That was also copyrighted in 1915, was it not?

A. Yes. We do our printing in the early winter.

The Court: When you get out your catalogue for the ensuing year, as I understand, you get it made up so that it shows what you have to present for the ensuing year and that is gotten out in the fall or the latter part of the preceding year and then designated as the catalogue for the succeeding year?

A. Yes, that is the way we do it.

The Court: And you copyright it when you have it printed?

A. Yes, sir.

Q. Now give me those exhibits. They were introduced this morning, if your Honor please, plaintiff's exhibits that the defendant introduced in evidence. Now, Mr. Stark, in your Exhibit "K" attention is called to page 44, in which this appears—and your Exhibit "K" is your catalogue for what year?

A. This is a catalogue we used in 1915-1916.

Q. And in this Exhibit "K" on page 44 you have this statement: "No connection with any other concern; the William P. Stark Nurseries deal directly with the planters. We do not have agents and we never have had agents. Anyone representing himself to be our traveling agent is a fraud. The William P. Stark Nurseries is not connected or related in any way with any other nursery of similar name. We do business under the name of William P. Stark Nurseries and no other." Now in the three previous year books there is no such expression as that. Why did you leave that out of the other books?

A. We first used the statement on the letterhead and then the Bulletin statement followed and then this catalogue followed.

Q. How many thousands of those catalogues did you send out?

A. Oh, forty, fifty or sixty thousand.

Q. Forty, fifty or sixty thousand? And then for three years, at least, you sent out forty, fifty or sixty thousand respective catalogues each year without containing any such expression as that in those books, did you?

A. We carried a notice.

119 Q. Will you please answer my question?

Mr. Wilfley: If the court please, we submit the catalogues speak for themselves; there is no claim for any such expression in the books, and I think this is purely argument.

The Court: Well, the question is now directed to the time, to a question of why he didn't put it in previously. He has admitted they were not in previous books. Then he can state why he thought it advisable to put in this book.

Q. Well, they were not in the previous books?

A. Not in the catalogue.

Q. Not in the catalogue. I show you Plaintiff's Exhibit "3" and call your attention to a statement on page 55 beginning with "William P. Stark" and ending with the name "J. H. Hale, Trademark" and ask you if that was included in your subsequent catalogues?

Mr. Wilfley: We object to that, your Honor, the catalogues speak for themselves.

The Court: Well, we will get along faster if it can be agreed they are or aren't, and if you want to ask any further question about it you may do so. Otherwise they speak for themselves and you may take it up in argument.

EXHIBIT 1.

WILLIAM P. STARK, Plaintiff,

vs.

STARK BROTHERS NURSERIES & ORCHARDS CO. et al., Defendants.

Now this September 30, 1913, come again the parties plaintiff with his attorneys and the defendants by and with their attorneys and the trial of this cause is again resumed and after hearing all of the evidence in said cause, the argument of counsel, the cause is submitted to the court on the pleadings and evidence and the court finds the issues in said cause in favor of the defendants and plaintiff's bill is dismissed and cost is by the court a*jd*udged against the plaintiff.

It is therefore considered, ordered and adjudged by the court that the plaintiff take nothing by his writ and that the defendants have and recover of and from the plaintiff their cost herein laid out and expended and that execution issue therefor.

STATE OF MISSOURI,
County of Audrain, ss:

I, E. F. Elliott, Clerk of the Circuit Court for the County and state aforesaid hereby certify that the above and foregoing is a true copy of the Original Judgment of Court, in the case of William P. Stark vs. Stark Brothers Nurseries & Orchards Co., et al. as the same is of record in Record Book #34, at page 229 of this office.

Witness my hand and seal of said court, at office in Mexico, Missouri, this June 2nd, 1917.

(Signed) E. F. ELLIOTT,
Clerk of the Audrain County Circuit Court.

[SEAL.]

120 EXHIBIT 2.

Application of Stark Brothers Nurseries & Orchards Co. for the Issuance of a Complaint Against William P. Stark Nurseries.

File No. 1-188.

Resolution.

Whereas, The Stark Brothers Nurseries & Orchards Company, through its attorney Andrew B. Remick, applied to the Commission for the issuance of a complaint against William P. Stark Nurseries, alleging unfair methods of competition and submitting in support thereof certain correspondence and other documents, and

Whereas, The Commission has taken no final action in the matter, and

Whereas, The applicant, through said attorney, submitted, under date of May 8, 1916, a request that the Commission suspend proceedings and hold the complaint in abeyance until further advices, assigning as a reason therefor that the applicant has filed suit in the courts of the State of Missouri against the same party and on the same grounds mentioned in said application to the Commission, therefore be it

Resolved: That such request be, and the same is hereby, granted:

Further Resolved: That the documentary evidence submitted by the applicant be returned to applicant if requested.

Adopted by the Commission June 30, 1916.

For the Commission:

(Signed) LEONIDAS L. BRACKEN,
Secretary.

[SEAL.]

EXHIBIT 3.

(*Copy of a Form Letter.*)

William P. Stark Nurseries,

Orchard Experts and General Nurserymen,

Stark City, Missouri,

U. S. A.

Nurseries at Stark City, Mo.

General Offices & Packing Houses at Neosho, Mo.

William P. Stark Trees Direct At 50% of Agents' Prices. We Employ No Agents but Sell Direct to You.

Neosho, Missouri,

January 26th, 1917.

Elizabeth Dietrich,
Wilmette, Ill.

DEAR MADAM:

No doubt you received our catalog as you requested. We assume that you are still interested in fruit growing.

121 Plan Early.

Now, while you have more leisure, is the time to make your plans, select your location and choose your varieties.

Order Early.

Every successful fruit grower would say "Get your order in early." This is good advice, especially this year. The first two years of the

war people put off planting. But this year the demand is greater than the supply. You may prefer certain sizes, kinds or varieties. The chances of getting just what you want will not be as good a month or two later.

Plant Early.

If you plan early and order early, you can also plant early. The early planted tree makes a better start and a quicker, better growth. Furthermore, early planting will not interfere with other work.

Let us remind you—

1st, that we sell only first-class trees and plants in full health and vigor. Our customers are favorably impressed by the widespreading, heavy roots of Wm. P. Stark trees.

2nd, that we guarantee true-to-name (see page 159 in the catalog).

Where to Buy.

3rd, that we guarantee delivery in good condition (see page 159). We have given satisfaction to planters in every state and in many foreign countries, even Japan and China.

4th, that we have no agents, but sell direct-from-nursery only, thus eliminating all commissions and many causes for dissatisfaction such as delays in delivery, mixing labels, wrong advice and misrepresentation. Anyone who claims to be our agent is a faker.

5th, that we have no connection with any other nursery.

6th, that we can doubtless refer you to satisfied customers in your section.

7th, that we leave no stone unturned to ensure your satisfaction and success.

Let us Help You.

If you will tell us about your soil and climate, whether you wish to grow for home use or for local or distant markets, how much land you wish to plant, etc., we would be glad to send you an estimate on the varieties we would recommend for your particular needs.

Whether you are able to grow for the market or not, you doubtless have room for a home orchard which will provide plenty of fine fruit for eating and canning at a little expense.

Plan now.

If you put it off, you may not get started this year at all. It won't cost you a penny to figure out now how to get profit and pleasure from fruit.

Yours sincerely,

WILLIAM P. STARK NURSERIES.

K-4.

122 P. S. Our catalog will be gladly sent to any interested friend. "Inside Facts of Profitable Fruit Growing" and "How to Beautify Your Home Grounds" are sent for 10 cents each—free to customers who order $2.00 or more.

Mr. Pearson: The only thing is it might be very hard for a man to get out a catalogue of that size and remember everything he put in one or the other is the only point I have in mind.

The Court: There is no point to the question unless it is followed up by seeking some explanation for it. Of course, the question, otherwise it stands there on the face of the papers as they are there.

Mr. Matson: Well, I am going to follow it up and read the article, too. Please read the question.

(Question read.)

A. Bring me the catalogues.

Q. Give me the catalogues.

(The catalogues handed to witness.)

A. It previously covered about the same ground there, condensed, though.

Q. It is condensed in the other catalogues. Now I will read you from this plaintiff's Exhibit No. 33 on page 55: "William P. Stark trees. Being absolutely convinced of its great commercial value and that the horticultural world was now entitled to share with me in the joys and profits of growing it, I looked among my many nursery friends for one who from broad acquaintance, strict integrity and natural responsibility was best in a position to distribute this great peach to the world, and none answered so well all of the requirements as did my friend, William P. Stark of Stark City, Missouri, who having associated with him William H. Stark—'a chip off the old block,' only more so—with a great nursery located on ideal soil, almost in the center of the United States seemed to be the one firm above all others to spread the gospel of the wonderful peach to every corner of the earth where peaches can be grown. Now the name "Stark" has for nearly a century been associated with the nursery business of America and for the last quarter of a century William P. Stark has made the name a sort of trade-mark for big things in the nursery work. And now with William P. Stark's great name and lifelong experience to direct affairs, and William H. to execute it, the William P. Stark Nurseries are in a better position than ever to continue and broaden the Stark Nursery business in Missouri at their Stark City plant." Now I will show you in addition to this plaintiff's exhibit that I have just read to you, plaintiff's exhibit No. 15 at page 55, which is your catalogue copyrighted in 1913, and plaintiff's exhibit No. 16, which is your catalogue copyrighted in 1915, and plaintiff's exhibit No. 14, which is your catalogue copyrighted 1912, and ask you if that same article, in substance, is not in each one of them?

A. Yes.

123 Q. Now, Mr. Stark, whatever publicity and benefit was given to the name "Stark" in the nursery world that you refer to here was given during the existence of Stark Brothers Nurseries & Orchards Company, and its immediate predecessors, was it not?

Mr. Wilfley: We object to that, Your Honor. That is a statement of Mr. J. H. Hale, a letter of Mr. J. H. Hale, and speaks for itself. It is rather a long letter and a very plain letter and there is not——

The Court (interrupting): Oh, well, as far as that is concerned it is a letter which is given the currency and the stamp of approval by the defendant in this case, so that, of course, it is adopted by him, comes just the same as though it was his statement when it is issued in his catalogue. Of course, whatever it may be worth, I will take the status of it.

Q. That is true, isn't it Mr. Stark?

A. We published those catalogues. We assume responsibility for those statements.

Q. And you stand responsible for those statements and the statement that is made therein was the result of advertising and work done by the complainant company and its predecessors and gave the name "Stark"——

Mr. Wilfley (interrupting): We object to that, your Honor.

Q. (Continuing:) That prominence.

Mr. Wilfley: Nothing in the statement at all to indicate anything of that kind. Just an argument Mr. Matson is attempting to make.

The Court: Well he may state what his version is as to what the origin of this "Stark" name was. He is asking about that, what the statement means.

Mr. Wilfley: Well I submit the statement refers to W. P. Stark and his long superior work in the nursery business.

Mr. Remick: And a trade-mark too.

Mr. Wilfley: There is nothing about a trade-mark in the statement. That is exactly it.

The Court: Yes, it said—made the name "Stark" as a sort of trade-mark.

Mr. Wilfley: Well he does not mean the trade-mark involved in this suit.

The Court: Well I know, but of course this has to do with another element of the case.

Mr. Wilfley: Well, of course, it seems to me that any comment this witness may make upon his statement, which is a letter from Mr. Hale, would not be relevant or competent.

The Court: Oh, he says he has assumed responsibility.

Mr. Wilfley: Well, I know, the firm.

(Question read.)

A. I think Mr. Hale's object in making that statement——

Q. (Interrupting.) I am not asking that question, what Mr. Hale's object was. I asked you the simple question there if the name "Stark" didn't get that prominence and became virtually a trade-mark by virtue of this complainant company and its predecessors?

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A. The construction that letter puts on that statement——

Mr. Matson (interrupting): We object——

The Court (interrupting): Wait a moment, let him answer.

Mr. Matson: Your Honor, I know this witness.

The Witness: I know you too.

Mr. Matson: If he don't answer these questions, yes or no——

The Court (interrupting): Let him answer it first. Maybe he will answer it, but he won't if we keep this colloquy up.

Mr. Matson: All right, sir.

A. (Continuing:) The construction Mr. J. H. Hale puts on that statement refers very largely to my personal work in the Society of Horticulture, and to complete the statement, that work was paralleling with a great deal of the work of Stark Brothers.

Q. Now Stark Brothers during your connection with it sent out thousands and thousands of copies of advertising matter under your supervision, did it not?

A. Yes.

Q. Including these various exhibits we have introduced here in connection with the testimony of complainant, did it not?

A. Yes, many of them.

Q. And it was largely the result of that advertising that gave the word "Stark" the prominence that is spoken of in this catalogue that I have just read from, was it not?

A. That is true to some extent.

Q. Now, Mr. Stark, in your exhibits you introduced matters that referred to the expression that you were in no way connected with any other nursery and I show you a letter dated "Neosho, Missouri, January 26, 1917," which we ask the stenographer to mark Exhibit 3, and ask you if you didn't send out that letter?

A. That appears to be one of our form letters.

Q. Is there any such expression in that form letter that you had in some former letters that have been introduced in evidence here by your attorneys?

A. This letter was prepared by Mr. Hazen and it differs in style and working and otherwise from some previous letters.

Q. Well you sent it out through your mail matters?

A. Yes.

Mr. Wilfley: Let me see it, will you please, sir?

Mr. Matson: Oh, I beg pardon, Mr. Wilfley. (Handing letter to Mr. Wilfley.) We offer that exhibit in evidence.

Mr. Wilfley: We have no objection.

Q. Now I show you a letter——

The Court (interrupting): Well let us see it then, if it is offered.

Mr. Matson: I offered it to prove a negative more than anything else, that there is no such expression as that in the letter.

The Court: As what?

Mr. Matson: That it is not connected with any other nursery.

Mr. Wilfley: It is on the second page, the fifth paragraph. That is what is there.

125 The Court: Yes, "We have no connection with any other nursery." That is there at the top of the second page.

Q. Now I show you another letter dated March 18, 1916, which we ask to be marked as Plaintiff's Exhibits 4-1 and 4-2.

Mr. Wilfley: What is the date of that, Mr. Matson?

Mr. Matson: March 18, 1916. And ask you if your company sent out that letter.

A. Yes, that is a circular form letter.

Mr. Wilfley: May I look at it?

Mr. Matson: Yes, certainly. (Letter handed to Mr. Wilfley.) We offer that exhibit in evidence for the purpose of showing it doesn't contain the expression, or any expression with reference to not being connected with any other nursery. You do admit it doesn't contain any such expression, Mr. Wilfley?

Mr. Wilfley: The letter speaks for itself, Mr. Matson.

Mr. Matson: Well, I know it.

Mr. Remick: Your Honor, the point is the witness testified on direct examination that he put them on all his circulars the sentence underneath, "We are not connected with any other nursery."

Mr. Wilfley: Oh, no, he positively testified there was some of them he didn't put that on, some letters at a later time after he put in his catalogues and in his bulletins.

The Court: As far as that is concerned, I don't think it must necessarily follow every possible circular or letter sent out should contain that statement.

Q. Now, Mr. Stark, I show you Plaintiff's Exhibit No. 21 dated January 12, 1916, addressed J. R. Elder, Sioux City, Iowa: "Dear Sir: We have heard of a man in your vicinity who claims to be our agent or salesman. He is a fake," and ask you if you sent out a great many of those letters over the United States?

A. Yes, that is one of our letters and we mailed quite a number of them.

Q. Have you examined that letter? Does that letter contain any statement that you are not connected with any other nursery of the same name or anything of that character, and if so please show where it does so contain it?

A. I covered your question in the previous answer explaining that we carried the notice on many letterheads, many bulletins, many catalogues, but there was some——

Q. (Interrupting.) Now, Mr. Stark, I have asked you that question, not anything else. I have asked you a question definitely directed to that letter.

The Court: Well he hasn't finished answering.

A. I also stated some letters where we omitted it in order to make room for a longer letter.

Q. Well is that one of them?

A. Yes.

Q. And you sent out thousands of these circulars?

A. Quite a goodly number.

Q. Mr. Stark, your home and chief offices are at Neosho, Missouri, are they not?

A. Yes.

126 Q. And you have a plant at Stark City, Missouri, haven't you?

A. Yes.

Q. The mail that is sent to Stark City, Missouri——

A. (Interrupting.) Let me complete my answer. We have large nurseries surrounding Stark City and our general offices were there where my son resided for more than a year. We have some nurseries at Neosho. Our packing houses and general offices now are in Neosho.

Q. Well, your packing houses and general offices have been in Neosho ever since you have been connected with the company, have they not?

A. No, the first year the general office was in Stark City and later when my son moved to Neosho, we moved the general office there. We have maintained a branch office at Stark City during the heavier business seasons.

Q. How long did you remain at Stark City, how long did your son remain there?

A. He lived there for about a year and a half, I think.

Q. At Stark City?

A. Yes.

Q. How long did you live at Stark City?

A. I have lived at Neosho.

Q. You have never lived at Stark City?

A. No.

Q. Now then you advertise in your advertising and call—and special the feature, the postoffice at Stark City, don't you?

A. Yes, there is where our nurseries are located.

Q. And your mail matter has to be sent to Stark City and then it is sent from there by the postoffice authorities to Neosho, Missouri?

A. Yes, unless it is delivered personally to our representative.

Q. Well, but that is the custom and rule you have, the government has to do the double duty by virtue of your advertisement, sending this to Stark City and then afterwards sending it to Neosho, Missouri? Isn't that true?

Mr. Wilfley: If the Court please, I object to this question. I can't see what the government has to do with handling this mail as it has anything to do with the trademark in this suit.

The Court: He may answer the question.

A. Yes.

Q. Now what was the former name of what is now known as Stark City?

A. I understand it was named Chester.

Q. When did they change the name from Chester to Stark City?

A. I think it was about August or September, 1912, I think.

Q. You had had considerable correspondence with the department urging the change of the name of Chester to Stark City, had you not?

Mr. Wilfley: We object to that, Your Honor. The correspondence speaks for itself and the plaintiffs have the correspondence in their possession.

127 The Court: Well, if you have the correspondence with you that may be shown and his attention called to it.

Mr. Matson: Well you discussed that matter with your son, didn't you?

A. I was in Michigan at the time that change was made.

Q. Well what time were you in Michigan?

A. I spent the summer there until in September.

Q. When did you go to Michigan?

A. I think I went up about early in July and left there in September.

Q. And during—1912 you mean?

A. Yes.

Q. And during that time this change was being made of the name of that city to Stark City?

A. I understand so.

Q. Well you learned that from your son and your own self, you knew that was going on, didn't you?

A. Yes, I knew something about it.

Q. You were instrumental in trying to make that change, weren't you?

A. I was not.

Q. You had nothing to do with it?

A. I did not.

Q. And you had nothing to do with trying to urge upon the Department the completing the change, did you?

A. I could not say.

Q. You couldn't say?

A. That correspondence——

Q. (Interrupting): You don't remember? Haven't you seen this correspondence?

A. I don't know that I have.

Q. When did your son go down to that city?

A. He went there in the spring of 1912, I think.

Q. The spring of 1912; do you remember the date?

A. April, I think.

Q. In April, 1912?

A. Yes.

Q. Don't you know that it was from that time on that the effort was made by your son and you were kept in touch with it, to change the name to Stark City?

A. The banker at Neosho told the banker at Stark City, told me when I was there in September when I returned from Michigan, that they had made the change and were very glad to do it.

Q. Was that the first information you had about it that they had made the change?

A. Oh, I knew it was being considered.

Q. And being considered by you and your son, wasn't it, Mr. Stark?

A. I was advised they were considering that change, yes.

Q. And you wanted it done?

A. I was willing for it

Q. And you wanted it done so as to get the name Stark in connection with the postoffice, didn't you?

A. We were willing for it.

Q. You wanted it done, didn't you, Mr. Stark, and was instrumental in having it done, weren't you?

A. No, I can't say that. We appreciated the compliment.

Q. Well what other object did anybody have down there to
128 change the name of Chester to Stark City except for your use and benefit?

Mr. Pearson: We object as asking for a conclusion or opinion of some other party.

The Court: Oh, well, if he knows of some other parties who were anxious to have it done he may say so, and if it was done at the instance of himself or his company why that can be stated. We will get along somewhat.

Q. Repeat the question, please? (Question read.)

A. The bank at Stark City and the leading merchants told me that they appreciated our coming there and buying several large farms for nursery prospects around the town, and they were very glad to compliment us in that way.

Q. And do you want this court to understand you that they took that up without any solicitation or intimation on your part or the part of your son, is that it?

A. I made no such solicitation.

Q. As to whether or not you did do it or not, either you or your son?

A. I made no such solicitation of those people.

Q. I asked you the question if you or your son, to your knowledge, had anything to do with the changing of the name of that city to Stark City, and that postoffice?

A. My understanding is it was voluntary on the part of the leading citizens there.

Q. I asked you, you or your son?

A. Without solicitation either by me or my son.

Q. I asked you if either you or your son had anything to do with the changing of the name of Chester to Stark City, Missouri, and the postoffice?

A. I understood that that was the voluntary action of the citizens.

Q. I asked you if you or your son had anything to do with the

changing of the name of the postoffice of Chester to Stark City, Missouri?

A. It might be possible that we assisted them some little in it, but I don't recall that.

Q. Do you recall that either one of you had anything to do with it at all prior to the date that you speak of that you had some information about it while you were in Michigan?

A. My son may have written me about it, possibly did.

Q. And it was taken up by you and your son and considered to be of advantage and for that reason you wanted the change made, did you not?

A. We were very willing for it.

Q. I show you a letter dated Louisiana, Missouri, November 12, 1912, which reads as follows: "Dr. C. P. Cranfield, Chief Assistant Postmaster General, Washington, D. C. Dear Sir: Kindly advise me or office William Stark Nursery Company, Chester, Missouri, when the postoffice change will be completed from Chester to Stark City. We are desirous of mailing our catalogues with the printed address of Stark City. Now holding the same waiting your advice, We will appreciate the information. Yours very truly, W. 129 P. Stark." And ask you if you didn't dictate that letter?

A. This letter was written and signed by my secretary.

Q. I asked you if you didn't dictate that letter?

A. I judge that I did I knew that the change was under consideration there and I asked for information.

The Court: When was that date?

Mr. Matson: That is November 12, 1912.

Q. Now then——

A. (Interrupting): At that time I had not moved to Neosho.

Q. Now I see you state "Kindly advise me here, also William Stark Nursery Company" Now then you first called your company the William Stark Nursery Company?

A. My son engaged in business under that name.

Q. Well you were aiding and assisting your son?

A. I endorsed some notes for him.

Q. And your son was engaged in that business while you were still connected with the complainant company at Louisiana, Missouri?

A. He started his nursery that season.

Q. Well he started in that season, Mr. Stark, while you were still engaged with Stark Brothers Nurseries & Orchards Company at Louisiana, Missouri?

A. Yes.

Q. So whatever financial matters he had were the result of your backing and endorsement largely were they not?

A. Partially so, not entirely. He had some money of his mother's and I endorsed some notes. He had offers from other friends.

Q. I show you a letter dated July 11, 1912, with the name "W. H. Stark" signed to it and which letter is addressed to Mr. Wallace Bassford, Secretary to Speaker Clark, Washington, D. C., and ask you if that is the signature of your son?

A. Yes.

Q. I ask leave to read into the record these letters from the department. These letters have been sent her- at my request for the benefit of both sides of this case. They are the original files with the Post-office Department and have to be returned.

The Court: Very well.

Mr. Wilfley: I don't think the letter is competent or material but I have no objection to it if he reads the letterhead and puts in the whole thing.

The Court: Read the letter.

Mr. Matson: The letterhead is "William Stark Nursery Company, orchard experts and general nurserymen, Chester, Missouri, U. S. A. William Stark trees deduct the 50 per cent agents' prices. We employ no agent but sell direct to you by mail." So far as the letterhead. Now the letter:

130 July 11, 1912.

"Mr. Wallace Beesford, Secretary to Speaker Clark, Washington, D. C.

Dear Mr. Beesford:

Enclosed is a petition which we would like to have acted on and passed just as soon as possible by the postal authorities. I am very anxious to have it passed for reasons which you will understand and without unnecessary delay as a number of people were very kind in desiring this change. Are anxious to know about changing stationery and so forth. I am sure you can attend to this without bothering Mr Clark.

Will say that the town of Chester has only about 150 people and this petition to change the name from Chester to Stark City is signed by every business house in town, the bank officer, one railroad, by the mayor of the town, the postmaster and the town trustees, by a number of the leading citizens of the town and I believe we would get all the citizens if we took the time to hunt them up. It is also signed by the local bank and by the Monark Townsite Company, which has opened and developed town along the new railroad, the Missouri & North Arkansas. I trust we may get favorable action on this just as soon as possible. Have purposely kept my own signature off the petition.

We feel too sore to say very much about the failure at Baltimore. The people at home and everyone here are proud of Mr. Clark. I am right in saying that if possible they are prouder of him in defeat than they possibly could have been had he been nominated and elected. No doubt the course of action which he took appears to him as the only natural and honorable one to pursue, not to appreciate, how broad and how worthy his action really was. There was a great many Bryan people in this neighborhood when we came down last spring. To date I know of only three who even profess to support or try to excuse Mr. Bryan's action and one of those is very doubtful. Everyone is bitter because of Bryan's action. There can be no doubt

as to his motives, it certainly was not for the good of anyone except for "W. J. B."

I am enclosing statement to go with the petition which you may forward to the Postmaster General or treat as you think best.

Yours very truly,

W. H. STARK."

Mr. Wilfley: Read the bottom too, Mr. Matson.

Mr. Matson: "We have no connection with any company of the same name."

Mr. Wilfley: The date of the convention was——

The Court: July 11, 1912. Who is this letter addressed to?

Mr. Matson: This letter is addressed to Mr. Wallace Bassford, Secretary to Speaker Clark, Washington, D. C., in which they
131 send on this petition and say they have reasons for keeping their own name off of it. The petition we offer in evidence accompanying this letter.

Mr. Wilfley: We have no objection to it.

Mr. Matson: "Petition for the appointment fourth class postmaster. March 28, 1912. To the Chief Assistant Postmaster General, Division of Postmasters Appointments.

We the undersigned patrons of the postoffice at Chester, Newton County, Missouri, respectfully request thee to change the name of Chester, Missouri, to Stark City, Missouri." The signatures—petitions must be signed personally. I don't care to read those signatures unless you wish it?

Mr. Wilfley: I don't.

Mr. Matson: It is signed by thirty-nine people.

The Court: Very well.

Q. Mr. Stark, on March 28, 1912, both you and your son were connected with Stark Brother Nurseries & Orchards Company?

A. I was.

Q. On March 28, 1912, your son was connected with Stark Brothers Nurseries & Orchards Company?

A. He had *at* severed his relation about that time.

Q. On March 28, 1912, wasn't he an officer of Stark Brothers Nurseries & Orchards Company?

A. He was an elective officer and his term expired in June but prior to this time he had had a conference with the president E. W. Stark, and the relations were practically severed.

Q. He had not tendered his resignation on March 28, 1912?

A. He was an elective officer and had no occasion to offer a resignation until they threatened to humiliate him by putting him on the record he was going to be discharged.

Q. On March 28, 1912, your son, William H. Stark was still one of the officers of the complainant company, wasn't he?

A. He had retired from the company that spring.

Q. On March 28, 1912, wasn't your son, William H. Stark, connected with the complainant company as one of the officers?

A. He was elected up to—for that year.

Q. And therefore was still an officer of that company at that time, isn't that true?

A. Not actively, because he had arranged with the president to sever his connections.

Q. Now, Mr. Stark, I will again ask you the question——

The Court (interrupting): Oh, that sufficiently appears.

Q. He was drawing pay from this company as an officer of this company, wasn't he?

A. He had severed his relations that spring and was arranging to move away with the understanding of the president.

Q. Now, I—as far as this court is concerned, but then the record I think——

The Court (interrupting): I expect you can shorten the record if you wish to.

132 Q. Can you tell and do you know, Mr. Stark, the date that your son resigned?

A. Verbally he resigned——

Q. (Interrupting): Written I mean in writing——

A. (Interrupting): Let me answer my question.

Q. I withdraw that question and ask you if you know when your son tendered his resignation to the company?

A. Yes, I know.

Q. Well, it was after the date that I have just read to you in March, wasn't it?

A. Completing my answer——

Q. (Interrupting.) I insist now this witness answer my question.

The Court: Just answer that question whether after that date.

A. Verbally he had resigned.

Q. I insist he answer the question.

The Court: Answer the question about the written resignation and then you may add any explanation.

A. He had resigned to the president personally in March, possibly earlier. They talked it over several times and he had arranged to move during March and after he had been away some time they put an ugly notice saying that they were going to discharge him——

Mr. Matson (interrupting): We object to that Your Honor, going into this record.

The Court: Proceed with the answer.

A. They sought to humiliate him by putting on the record he was discharged and at that time he tendered a written resignation.

Q. What time was that?

A. That was in May or June, I think.

Q. 1912?

A. Yes, but he had severed his connection before that.

Q. Mr. Stark, Mr. Remick insists I ask you this question, why that you feature the word "Stark" so prominently in connection with the word city in your various advertisements?

A. For the same reason that Stark Brothers and other advertisers feature the name of their town as Louisiana, Missouri, or Kellogg at Kalamazoo, Michigan. It is an advertisement. What is to be read.

Q. You know, Mr. Stark, at that same time the parent company, the complainant in this case, was featuring the word "Stark Station" in their literature, didn't you?

A. They didn't use that statement but a little while.

Q. I insist the witness answer my question. We can get through if he will——

A. (Interrupting.) No, I don't consider they used it in that way.

Q. You knew they were using it?

A. I knew it was used there one time as a key and there was some confusion at the post office and the company couldn't identify
133 or locate mail from such a place, and it caused confusion and so they dropped it. It was a mistake.

Q. You knew in 1912 when you had—when the name of the post office was changed from Chester to Stark City and you had prepared your advertisements from that, that Stark Brothers, the complainant in this case had been featuring the words "Stark Station," didn't you, and that it was done under your supervision while you were a member of that company?

A. Hand me your——

Q. (Interrupting.) This is another matter (referring to something he held in his hand). I am asking you a simple question there.

A. Well, refer me to the advertisement you speak of.

Q. (To Mr. Remick:) Get one of our books there where Stark Station is used.

Mr. Wilfley: What is the date of that?

Q. I show you in response to your request, plaintiff's Exhibit No. 24, which has the date February, 1912, and ask you if at the bottom at page 88 of that exhibit the words "Stark—" "Stark Station" is not featured?

A. Stark Station there is given the number 210 just like a post office number or a street number to identify the returns from that advertisement should be credited up to "The Fruit Grower." That was merely a key number put in by the advertising agent at Chicago and was not featured as an address. "Louisiana, Missouri," there is the address featured.

Q. What was that on that other advertisement except that one page you have there, Mr. Stark, wasn't it placed there while you were still a member of the company?

A. This is used on The Fruit Grower advertisement of this date. It didn't——

Q. (Interrupting.) You were an officer of the company at that time, February, 1912?

A. I don't know whether I was or not. That is a question. I had been practically discharged at that time. Your records show that.

Q. You were still drawing $6,000.00 a year, at the rate of that from the company?

A. I never drew $6,000.00 a year.

Q. How much did you draw?

A. I worked there for many years for $2,500.00

Q. Well, the latter part of the time?

A. Let me finish my question. I worked there for a long time for $100.00 a month. Later my salary was made $2,500.00 a year. When I took on the president's work, his health broke down, they made it $3,000.00, and the last few months or year or so, about a year it was, it was made $5,400.00 for a short period, about $6,000.00.

Q. Well, it was $5,400.00 in February, 1912, wasn't it, at the rate of $5,400.00 a year?

A. Yes, but I was practically frozen out at that time.

Q. Well, since you have mentioned that, the other members
134 of the company holding the stock there didn't vote against you or didn't vote for you for director in 1912, did they?

A. No.

Q. Now you get your mail and have it sent to Neosho, Missouri. Why didn't you use Neosho, Missouri, where your chief offices are, in your advertisement at the present time if you are not trying to get the benefit of the word "Stark" in connection with the word "Nursery?"

Mr. Wilfley: Now, if the court please, we submit the advertising material that we have shown here shows that their offices are at Neosho, and their nursery is at Stark City. Their letterheads show that the catalogues show that.

The Court: The question is why mail was directed to be sent to Stark City instead of Neosho. He may answer that.

A. Because our nurseries and the nursery lands we own are surrounding Stark City.

Q. Mr. Stark, then why when you were at Louisiana, Missouri, and you had nurseries surrounding there, the land owned other places, Stark Dale, Stark City, Missouri, why did you not have the mail sent there instead of to Louisiana, Missouri?

A. Stark, Missouri, was a little country town five miles off of a railroad, just a little neighborhood, a postoffice. Stark Dale was a flag station down in the lower part of the county.

Q. Now Stark City is not nearly as large a town as Neosho, is it?

A. No.

Q. And isn't it a fact, that you do it so as to get the benefit of the name "Stark," to connect it with the word "Nursery" isn't that a fact?

A. We do it because that is our location of our nurseries.

Q. But all your mail matter is sent out from Neosho, Missouri, isn't it, the outgoing mail goes from Neosho, Missouri?

A. I am not through yet. We own several large tracts of nursery land surrounding Stark City and that is where we grow the trees we advertise. We have got a peculiar soil there that produces superior quality of trees and we want the identity of those nurseries to go right along with our business.

Q. You want the identity of those nurseries to go right along with Stark City, too, don't you?

A. Yes.

Q. And did you answer the question as to whether or not your outgoing mail is sent from Neosho?

A. We mail considerable from Stark City.

Q. What proportionate part then, Mr. Stark, in comparison to Neosho do you mail from Stark City?

A. The largest share is mailed from Neosho.

Q. That is the home and your offices?

A. Yes.

Q. You say that you also call attention to Neosho in your ad? I show you plaintiff's Exhibit No. 22 to the deposition of Mr. E. W. Stark, which is the Weekly Kansas City Star of Wednesday, November 3, 1915, and ask you why you left off your post office Neosho, Missouri, in that ad?

135 A. We advertise the name "Stark City." Two names would be confusing.

Q. Now, Mr. Stark, I show you the Country Gentleman of January 29, 1916, at page 194, and ask you—which is the Exhibit No. 39 to the deposition of E. W. Stark, and ask you why you left Neosho, Missouri, off of that ad of the Country Gentleman?

A. Because our nurseries are at Stark City and we advertise one post office only.

Q. Mr. Stark, I call your attention——

A. (Interrupting.) Let me get through.

The Court: Proceed.

Q. I also call your attention in that, Mr. Stark, to the label "Nursery 2 Orchd. William P. Stark" on a tree, "Nurseries" afterwards, Stark City, Missouri. Now that is the same label that you attached to these various trees sent out, is it not?

A. Yes; similar.

Q. You know the circulation of the Country Gentleman?

A. Yes, in a general way.

Q. How much, how many?

A. Several hundred thousand.

Q. Would you say how many, Mr. Stark?

A. Several hundred thousand and growing.

Q. Now you say that label, that if the picture which is shown there in that exhibit, in the Country Gentleman, is attached to the trees that you have been selling?

A. Yes.

Q. About how many shipments would you say you had in the year 1913, to which that label was attached?

A. I think it was quite small that year. It was our first season, the first spring.

Q. And can you give about how many labels, about what it would amount to, run up in thousands?

A. Well, it was several thousand customers.

Q. And that was true in 1914?

A. A larger business the next year.

Q. And it kept on increasing from that time?

A. Yes.

Q. Your business has continued to increase from the inception of it?

A. Yes; growing.

Q. Growing. Now you say you have made no shipments since the petition or complaint in this case was served upon you to which you attached that label?

A. I stated this morning in the direct examination that there might have been a few old labels left over that were used, remnants, but that there was no repeat order on the labels. We adopted a new form as shown by this catalogue for 1917.

Q. Mr. Stark, I notice that the word "Stark" is made prominent there upon the picture of a tree in that exhibit in the Country Gentleman, and that is similar to the label that you have been speaking of. Why did you adopt that in that way?

A. Well, originally I had stated this morning, that that was put by the artists as an ornament at the top of the catalogue page and then we used it in our labels.

Q. Well, you think it did ornament the label too?

1366 A. It is a very good advertisement.

Q. A very good advertisement?

A. But we have got a better one.

The Court: We will suspend here until 2.00 o'clock this afternoon.

Thereupon a recess was taken until 2.00 o'clock P. M. at which time the court convened and the plaintiff appearing in person and by its counsel, Mr. Remick and Mr. Matson, and the defendants appearing in person and by their counsel, Mr. Wilfley and Mr. Pearson, the following proceedings were had, that is to say:

WILLIAM P. STARK resumed the stand for further cross-examination as follows:

By Mr. Matson: Mr. Stark, you stated this morning, if I remember rightly, that there was no written contract with Jesse Hyatt relative to the Delicious Apple Tree, is that correct?

A. That is correct.

Q. There were letters and a contract, whatever contract you had was contained in letters, was it not?

A. There were some letters exchanged.

Q. Well, in those letters in exchanging there the contract was made by letter, wasn't it, whatever rights you had to that Delicious tree that you obtained from the father of Jesse Hyatt was by letter?

A. There was a five-year agreement.

Q. Whatever right you obtained to that tree originally from Hyatt, Senior, was obtained by letter, wasn't it?

A. The correspondence was written between our office and Mr. S. L. Hyatt, Jesse Hyatt's son—Jesse Hyatt was on his death-bed and

was in no condition to write letters—they were written by his son for him.

Q. Then, regardless of who wrote it, it was in letters, contained in letters, wasn't it?

A. Yes.

Q. Now, Jesse Hyatt, the son that you say wrote the letters for the father, is the same Hyatt whom you claim to have a contract for, as shown partly in plaintiff's Exhibit No. 32 in the Rural New Yorker of January 10, 1914, is it not in which contract the following is printed: "Extract from contract of S. L. Hyatt whereby he agreed to furnish William P. Stark exclusively all buds, scions, grafts and roots that may in any way be cut from the original Delicious tree as William P. Stark may direct, and gives William P. Stark the exclusive right to control the scions, grafts, buds and root for a term of twenty years."

A. You have read that correctly.

Q. Now, Mr. Stark, that is the son wrote the original letters to Stark Brothers Nurseries & Orchards Company relative to that tree, isn't that so?

A. Yes.

Q. Now then I show you in this complainant's Year Book
137 for the year 1910, plaintiff's Exhibit No. 10, as attached to Mr. E. W. Stark's deposition, on page 35, which reads as follows: "In 1895 we undertook the propagation and introduction of the Delicious, purchasing outright from Mr. Hyatt the sole right to it. In writing us that time, the originator included in his letter a description and history of the original tree which we reprint, since it is representative of the tree as it is grown in all parts of the country." Now you were in charge of the publicity part of the complainant company and especially in looking over and supervising this Year Book at that time, weren't you?

A. Yes.

Q. When that expression was made?

A. Yes.

Q. Now, when did you obtain your contract from S. L. Hyatt? It is not stated in your advertisement when you obtained it.

A. The records will show that it was in the last of September or early in October three or four years ago.

Q. Well, can you give the year?

A. Well, I think it was about 1914 or 1915, 1914, I think.

Q. Do you remember the date of the trial of the receivership case at Mexico?

A. Yes; it was after that date.

Q. That trial was in September, was it not?

A. Well, this was shortly after that.

Q. Then immediately after that trial and after the result in that trial, you went to Iowa, after having advertised through the world all these books and everything that Stark Brothers Company had this contract, you went to Iowa and made this contract with the son who had written the original letters to the company, didn't you?

A. Yes.

Q. You know all of these facts at that time too, didn't you?

A. Yes. I told you in the Mexico trial about the five-year contracts.

Q. You never told anybody until after it came out in your advertisement, especially the complainant company, that you were going up there trying to get that contract after you had advertised this through the world, did you?

A. The world was told of that five-year contract in the United States Department of Agriculture's Year Book, published to the world.

Q. But you then made this statement, caused the statements to be published all over the world wherever these books were sought for?

A. Yes.

Q. That Mr. Hyatt sold the tree outright?

A. For five years.

Q. You don't state that in your ad, do you?

A. No.

Q. Take it in all these various ads while you were connected with the original company it is stated as though you owned it completely, don't you?

A. The language states for itself.

Q. Mr. Stark, in addition to the other fruits that it has been mentioned here the original company had and that you are advertising, I will ask you if you recall anything about a wine sap seedling which you obtained from J. N. Crosby, Route No. 1, St.
138 Ann, Illinois?

A. We got a great many seedlings, apples sent in there.

Q. Do you recall anything about that in particular?

A. I don't remember the details about it. I may have seen the name, I may have seen the apple.

Q. Your deposition was taken in the receivership case in St. Louis, was it not?

A. Yes.

Q. I will show you a letter dated April 22, 1912, and ask you if you recall that letter?

A. Yes, I wrote that letter.

Q. We ask that that be marked Complainant's Exhibit 6 and then we offer the letter in evidence. I will read it.

Mr. Wilfley: Well, we object to that. There is nothing in these pleadings about any Wine Sap apples. Is nothing about some seedling of a Wine Sap apple.

The Court: Let me see it.

Mr. Wilfley: We object to it as incompetent, irrelevant and immaterial.

Mr. Matson: He was then an officer of the company at that time getting these new fruits, sending them down there to the company. He was then the treasurer of and a director in the company.

Mr. Wilfley: No evidence the fruit was worth anything or that either side knew anything about it, or that anything was done with it by the defendants.

The Court: On what theory do you think that is material, Mr. Matson?

Mr. Matson: At that time Mr. Stark was an officer.

The Court: Oh, I know that.

Mr. Matson (continuing): Of this company.

The Court: But, of course, we are not trying a case merely involving the relations between him and the old company as such.

Mr. Matson: Yes, sir, but he was taking the different fruits of this company up there that he thought of any value and while he was finding it for that company and appropriating to the benefit of his nurseries down here, which is unfair.

The Court: Have you got any charge in your bill of unfair trade of that nature?

Mr. Matson: Unfair trade generally, yes, sir.

The Court: Oh, well, I know——

Mr. Matson (interrupting): But it doesn't specify this particular item.

The Court: But you have specified generally the character of unfair trade in the matter of design.

Mr. Matson: Yes, sir. And this is proof of his efforts of the manner in which he undertook to take advantage of the company. Another thing, if Your Honor please, in his testimony he said he had been frozen out, or language of that character, of the old company. Now these acts along of his at that time show, or he was undertaking to take for his company down there. Then tend to show at
139 least, why they got rid of him and the advantages it shows another thing that he in the inception was organizing and assisting in the organization of this new company at Chester, Missouri; he was assisting in the organization of that and while still with this company was taking these advantages for it. Then it shows another thing, backing up our testimony in our year books, W. P. Stark did feature his name and asked correspondents to come to him individually, which was not caught by the officers of the company. W. H. Stark undertook to do that innumerable times while they were undertaking to move, so far as they possibly could, not only the Delicious apple and the manner in which he obtained the Hale Peach but all other fruits which he got for this company, and practicing this unfair method while with the old company with all this vast information.

Mr. Remick: Your Honor, here is an allegation in the bill that covers that, I think. Exactly. Shall I read it?

The Court: Read it.

Mr. Remick: "Then—while still an employe of the Stark Nurseries announced to the trade, with principal office at Louisiana, Missouri, and so forth, and so forth, that William P. Stark remained with the Stark Company and secured information that was of benefit to the rival nursery he was backing." That is alleged in the bill.

The Court: Well I don't know how far I shall consider it. You may put it in subject to objection. I have read it now unless you want to read it into the record.

Mr. Matson: We will read it into the record.

EXHIBIT 6.

(Carbon Copy of a Letter.)

April Twenty-second,
Nineteen Twelve.

J. N. Crosby, R. #1,
St. Anne, Illinois.

DEAR SIR:

We thank you for your valued favor.

Winesap seedling. The three apples received, splendid specimens, in good condition, apparently Winesap. We suggest that you have Benj. Buckman, Farmingdale, Illinois, your experiment station and others interested test the variety and ascertain if any improvement over the Winesap or paragon, which also is an improved Winesap.

If you are sure the tree is a seedling and you think worthy of propagation, you may express some scions to Wm. H. Stark, Chester, Newton County, Missouri.

I remain

Yours very truly,

W. S. P.—E. P. G. ——— ———,

140 Q. Now at that time, Mr. Stark, you were preparing your Orchard Book for the William Stark, or the W. P. Stark Nursery Company, were you not?

A. No.

Q. On April 22, 1912?

A. No.

Q. You weren't getting material for it at all?

A. No.

Q. When did you begin preparing your book for 1912?

A. The next fall.

Q. You mean in 1913 or the fall of 1912?

A. The fall of 1912, that autumn.

Q. Recalling the letters that I read to you this morning that you had written to the post office department and your testimony too where you said that you had had correspondence about that while you were up at Manitou in the summer of 1912?

A. Yes.

Q. Now don't you recall you stated in that you was preparing your literature at that time?

A. Well I took a vacation up there. My son might have been doing a little preliminary work, but the catalogue was prepared and published that fall.

Q. But you had been preparing it along and getting ready for it during that time. Now when do you say you first had any intention and began figuring on starting your new nursery at Stark City, Missouri?

A. My son located there in the spring of 1912.

Q. Well you had contemplated starting a nursery, a competitive nursery to the Stark Brothers Nurseries & Orchards Company quite a while before that, hadn't you?

A. My son had arranged to start business there that spring. Hold on, let me get through. I don't like to be interrupted.

The Court: Proceed.

A. (Continuing:) I considered that I was at Louisiana permanently.

Q. Well but prior to that time, Mr. Stark, hadn't you contemplated starting a competitive nursery to the parent company, the Stark Brothers Nurseries & Orchards Company?

A. There had been some talk of dissolution there, a division at the time I was not elected, but that was patched up afterwards.

Q. Well the time you were not elected was what?

A. 1911.

Q. 1911. And that was patched up afterwards?

A. Yes.

Q. And ran along for awhile at least?

A. Yes.

Q. How long?

A. It ran along that fall until after I had endorsed a lot of bank paper and then it broke off again and I was deprived of my office.

Q. Do you remember how late it was?

A. Well it was along in about Thanksgiving time.

Q. Along about Thanksgiving time?

A. Yes.

Q. Then you began again thinking of starting a competitive nursery, did you not?

A. After that there was a little more smoothing over.

Q. Well, Mr. Stark, will you answer the question if you
141 can, whether or not in the fall of 1911 you began figuring on starting a competitive nursery?

A. No, after smoothing over that friction we considered that these differences were adjusted and E. W. Stark made certain promises which he did not keep.

Q. Well that smoothing over was in August or September, 1911, wasn't it?

A. No, there was some——

Q. (Interrupting): When you came back there?

A. It was after that. There were several of those occasions.

Q. Now, Mr. Stark, I show you a letter dated November 10, 1911, addressed to James M. Irvin, St. Louis, Missouri, and which I ask to have marked as complainant's Exhibit No. 7 and ask you if you wrote that letter?

A. Yes, I wrote that letter about the time of this bank friction.

Mr. Wilfley: We would object to that as incompetent, irrelevant and immaterial. I can't see how it has any bearing on the trademark or anything, especially on competition. It was written as a

sort of suggestion to some friend long before even William Stark started a nursery. Therefore, I can't see how it could have any probative force in this trial.

Mr. Matson: This was about the same time of that Year Book episode where we claim they were taking the advantage of the information to start a new company. Shall I read it?

The Court: Read it subject to the objection.

EXHIBIT "7."

Stark Bros.'

Nurseries & Orchards Co.,

General Nurserymen.

General Offices & Home Nurseries, Louisiana, Missouri.
Growers of Fruit Trees, Fruit Plants and Hardy Ornamentals.
Branch Nurseries: Starkdale, Mo.; Marionville, Mo.; Rolla, Mo.; Fayetteville, Ark.; Rockport, Ill.; Huntsville, Ala.; Portland, N. Y.; Dansville, N. Y.; Girard, Erie Co., Pa.; Perry, Ohio; Twin Falls, Idaho; Hamilton, Mont.; Wenatchee, Wash.

Louisiana, Mo.,

November Ten, Nineteen Eleven.

James M. Irvine,
Saint Joseph, Missouri.

142 MY DEAR Irvine:

Your favor of the 9th received. All right, come over and I can then answer you more fully in reply to yours of the 3d inst.

Confidentially my friends think just about as you do, that if there is a competitive establishment, the foundation should be here and branch out from time to time. History shortly may be made very rapidly—a round-up.

The Galloway Company. I am writing Messrs. Francis of St. Louis to send you copies of their bond proposal, which tells an interesting mail order story. I wish you would comment on it generously, adding the personal touch, a simple proposition.

Packing. You will note from Mr. Farrell's men that we have made a splendid record—a record breaker and yet some or our people are walking the floor about late season and wanting to dig stock green with the pleasure of replacing it next season and making business for competitors.

Yours very truly,

(Signed with initials in pencil) W. P. STARK.

W. P. S.—M.

Q. Now, Mr. Stark, you have spoken two or three times about some bank episode there and mail matter. There was a difference between you and the president of the company relative to certain transactions with the bank in St. Louis, wasn't there, and as a result of that difference you mailed a letter in the company's envelope, and he went to the office and got that letter out, containing those matters, as president of the company? That was the substance of it, wasn't it, Mr. Stark?

A. No.

Q. Well, there was a difference between you as to whether certain things should be done or not done, wasn't there?

A. I exercised my financial duty and as customary sent deposits to the bank and checks for paying our obligations as they matured. I did so in this instance. The letter was put in the mail——

Q. (Interrupting): And the president went——

A. (Interrupting): The next day I learned that the president had gone to the post office with his nephew, Lloyd Stark, and then to the station and opened the United States mail and got that letter out of the mail.

Q. Yes, and it was afterwards brought back to you and it was on account of some difference between you, between the president and you as to whether or not the matter you attended to that way should go on, wasn't it?

A. He kept those checks for quite a long while until he thought he had some of the riffles smoothed out and then he came and handed them to me.

Q. Yes. You spoke about your son-in-law, Earl M. Wilson. Wasn't he a member of the original company that was started
143 by yourself and your son and you so published his name in the literature?

A. We wished him to be associated with us at one time but he went to Chicago.

Q. Well, you published literature with his name?

A. That was considered at one time and a few sample letterheads were run off, but not adopted in the business because he declined to come in.

Q. I show you a letter dated back February 3, 1912, and ask you who wrote that letter?

A. This letter was written by my son-in-law, Earl M. Wilson, which is a personal letter which was taken from my desk with some other letters, private letters.

Q. This letter was received by you?

A. Yes, and was purloined.

Mr. Wilfley: You want to use this in evidence?

Mr. Matson: Yes, sir. You may read it and see.

Mr. Wilfley: Now, if the court please, this is a letter from Mr. Earl Wilson, written from Chicago, February 23, 1912, a personal letter to Mr. Stark, his father: I can't see how it can have any bearing on any question of trade-mark, any question of competition.

The Court: Well, of course, the question of trade-mark we are

talking about unfair trade now and what led up to the circumstances and what effect that letter may have on the conduct of the parties in their trade. This is all this is. It doesn't bear on the question of trade-mark of course. I don't know really what that contains, but the theory of it is it bears on the unfair trade element in the case.

Mr. Wilfley: We object to it for the further reason that it is written by a party who is, by a person who is not a party to this suit or in any way connected with this litigation.

The Court: That might be. The point is what the relationship was between him and this witness and what this witness has to say about whatever that has to say. I don't know what it says. I can't tell anything about it until I see it.

Mr. Matson: We ask to file it as complainant's Exhibit 8.

Thereupon Exhibit 8 was made a part of the record, which exhibit is in words as follows, that is to say:

EXHIBIT "8."

Chicago, Feb. 23, 1912.

DEAR FATHER:

Once more I must call on you for funds—help for a little while—this time to take care of our February payment of $100.00 on Morrisiana and which I must get out to Denver by March first. I will be ever so grateful if you will send me a check for that amount until our Curtis money begins to come in.

After I got up here I found that the pay roll checks are is-
144 issued from Philadelphia and come only once a month. In making the lease for our house we were able to save $75.00 on rent by paying $100.00 down, which cleaned me up on the cash I had set aside to use for Morrisania. After the first of the month there will be an income beside the outgo and then we can begin to return the money you have so unstintingly given us.

From what I read in the "memo" you send me, plus what I can read between the lines, you have evidently stirred the cattle up to the stampede point. I am afraid too that you are the cause the 'Presidents' hasty return from Florida. Of all the brainless, assigine documents I ever read, that one from the Ass't Secretary's office about that form letter was the worst. That's the one where he said in 1-year-old style 'if you sign half, I'll sign half.' The President surely has cause to be proud of his good man Friday.

Keep it up father—stick the goad into them at every opportunity. They can't stand it because they get mad and when they are mad they are easy picking for you and Bill.

I am glad, very glad to hear of the pushing of work for the new company. When all is ready, your real inning will have come—it will be your proclamation of emancipation.

It looks like the last stage of the scrap is on and I sure would like to be in on it. To think I lived with it for 2 years and then to have to leave it when it gets really interesting is kind of a bitter pill. But

I do want to help all I can, whenever I can, so send me all the stuff that's in circulation.

I am getting more or less stuff from Margaret and as best I can am outlining things for her. I am glad to be able to do it, first because I like to and second because I like to feel that I still have a hand in things down there. Don't be afraid of sending too much—I can handle all that you send so call on me just as much as you want to.

You better come up with mother next week to see our house and to get a little rest—and to tell me all the news. It will do you good. Think about it.

Lovingly,

(Signed) EARL."

Q. Now, who is the "Margaret" referred to in this letter?

A. That is Miss Margaret Haley, who took on a part of Mr. Wilson's work when he left and he was coaching her in the work.

Q. Well, what stuff was it she was sending up there that he was referring to there?

Mr. Wilfley: We object to that, Your Honor.

Q. Was it anything relative to this new nursery that you was supposed to start?

A. I was sending Mr. Wilson copies of the records where they were going to discharge the treasurer, to obtain an assistant treasurer, taking away our rights and so on. We were at that time deprived by the record, the resolution, of our official duties and responsibilities, the bank interfered with and everything of that kind.

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Q. Were you sending any matter relative to the new company?

A. The new company was not organized at that time. My son had left there.

Q. Well, any new company would have been organized. This was February 23, 1912. That was after the time this Stark City postoffice was tried to be established down here, wasn't it?

A. No.

Q. You hadn't fixed that at all, had you?

A. What is the date of that?

Q. February 23, 1912.

A. This post office business came in later.

Q. Well, I mean you had been discussing it beforehand, hadn't you? Your son had been out looking for a new location at that time?

A. I think so.

Q. And this gentleman Earl signed his name "Earl" is your son-in-law, Earl M. Wilson?

A. Yes, sir.

Q. And he had been the advertising agent and representative of the complainant company and been connected with it?

A. Yes.

Q. Mr. Stark, in 1911 at the election of directors the latter part of June, 1911, you were not elected a director at that time, were you, you say?

A. I did not attend the meeting.
Q. You were there in the offices?
A. I was in the building.
Q. And declined to go in and participate in the meeting there? You didn't go in and participate in the meeting?
A. I was not present.
Q. At that time you controlled virtually the same amount and possibly a little more than you control now, didn't you?
A. About three-tenths
Q. How many shares have you actually, Mr. Stark?
A. About three-tenths.
Q. Well, can't you give the number?
A. Well, I think it is about between fourteen and fifteen hundred common and about thirteen hundred preferred, I think.
Q. Now, Mr. Stark, then following that election in the following September you came back into the company and was re-elected to your old place and you were re-put into the directory too, weren't you?
A. Yes.
Q. And you were paid also for the time you had been away during that time?
A. My salary was by the year.
Q. Yes. Then in 1912 by voting the common you have you elected yourself a director, didn't you?
A. I did.
Q. And you did the same thing in 1913?
A. I did.
Q. And you did the same thing in 1914 or was that the time you voted your stock and Mr. Wilfley, who is your attorney in this case, was elected a director?
A. He came in along about that time. It might have been later.
146 Q. Well, then in 1915, who was elected a director with your stock?
A. Mr. Culver.
Q. Mr. Fred Culver, who is the head of the accounting department of the complainant company then and now, isn't that true?
A. I think so.
Q. You have been continuously furnished with information concerning the plaintiff company, haven't you?
A. No.
Q. Haven't people who have been connected with that company up there been furnishing you any information?
A. I have endeavored to secure statements and information to which I had a moral and a legal right but I have got very little.
Q. You came there and had an accountant come and go over the company's affairs, didn't you?
A. Yes.
Q. And that accountant was jointly employed by you and by the company, was he not?
A. He was employed by me.

Q. Well, then afterwards jointly paid, wasn't he?

A. Yes.

Mr. Wilfley: When was that? Just state the date.

Mr. Matson: Well that was in 1912--no, it was in 1913 I think. Or was it 1913? Well, whatever year it was.

Mr. Wilfley: I want to get something in for the time, that was all.

Mr. Matson: 1913 that accounting was taken before the receivership trial at Mexico, wasn't it?

A. Yes.

Q. Now then you had by virtue of that accountant full knowledge of that five years of the company's business during all of which five years you were either an officer or a director?

A. Yes, sir.

Q. Since that time, Mr. Stark, who has been furnishing information up there to you from that office?

A. I have had very little.

Q. No one?

A. I have had very little information.

Q. Who has been furnishing it?

A. Occasionally the company have had statements sent to me, about once a year.

Q. Who has been writing you that is connected with the plaintiff company and its offices up there?

A. I have exchanged some correspondence with my director, Mr. Culver.

Q. Anybody else?

A. I have had some friendly letters back and forth with Mr. Farrell.

Q. Anyone else?

A. I don't recall anyone else right now. The secretary, Mr. Tom W. Stark, may have written me occasionally and Mr. Paul Stark has several times sent me letters that customers had had him disgorge which were remittances for William P. Stark Nurseries, but it has been very formal.

147 Q. You have got the names of customers of the complainant company during that time, haven't you?

A. No.

Q. From no source?

A. No.

Q. At all?

A. No.

Q. You say that Mr. Culver is furnishing you the information there while he is occupying that position?

A. I made no such statement.

Q. Well what do you say about what information does he furnish you?

A. He has sent me occasionally a statement by direction of the president, as I understand it.

Q. During the time that you were a director after 1912, did you attend any meeting until the meeting in which the compromise agreement was carried out in the latter part of 1913?

A. No.

Q. Well in the fall of 1911 while you were still there with that company didn't you get the list of names that the company had compiled for a long while of all customers in various portions to send advertisements to?

A. I did not.

Q. Who did?

A. I did not.

Q. Well who did?

A. I don't know. We didn't.

Q. Didn't you send them to the paper known as the Fruit Grower and try to get them to make a copy of them?

A. The Fruit Grower used the names from our Stark City Nurseries for years for their circulation.

Q. Well didn't you send those names there yourself during that time, during this controversy and try to get the Fruit Grower to make you a copy of them?

A. From the very origin the Fruit Grower had access to our names there for years.

Q. And you wanted the Fruit Grower to hold them for your use and benefit up there in the vault, didn't you? Isn't that true?

A. I don't recall it.

Q. Now the man, whom I have read that letter from, Mr. Irwin, that you wrote a letter to that I read here was one of the proprietors and the editor of the Fruit Grower, wasn't he?

A. Yes.

Q. And wasn't it about that time he was talking about starting this competitive nursery you got this complete large list of customers' names, sent them to him and asked him to make a copy of them, put that list in the vault up there for you?

A. Mr. Irwin contemplated starting a horticultural paper about that time and something of that kind may have been considered and discussed but I want to tell you now that I have no company's names. I left there with clean hands.

Q. Do you remember in your deposition in St. Louis you stated there was about 75,000 of those names?

Mr. Wilfley: Now, if the court please, as far as the cross examination of this witness, of a deposition that was taken in St. Louis in another case five years ago, it seems to me to be quite improper, and, therefore, I object to it.

The Court: I don't quite get the point. The point here is,
148 I suppose, that if this defendant secured the mailing list, or substantially, or anything of that kind of the complainant company, which he said he did not, for the purpose of sending literature out to them, it would have bearing upon the question of intent to invade the trade of the country provided any illegitimate methods were used. It would be a chain in the evidence.

Mr. Wilfley: The question though is now, Mr. Matson is taking up from what purports to be a deposition taken in another case five years——

The Court (interrupting): It doesn't make any difference what it comes from. This is as to the fact here. I don't know what it is.

To which action and ruling of the court the defendants then and there excepted and still except.

Q. Now, Mr. Stark, haven't you also tried to convey the idea that you were selling Stark trees without adding to it in any way, shape or form, the names of W. P. Stark?

A. No, I am selling William P. Stark trees.

Q. I will hand you what we ask to have marked as complainant's exhibit No. 9.

Mr. Wilfley: Now we object to this, Your Honor, for the reason it is not a letter. It purports to be a part of a letterhead evidently the same as the witness testified a while ago was never used by him, and since it doesn't purport to be addressed, written to any one, I can't see how it could be any evidence in this case.

The Court: Well let me see what it is.

Mr. Wilfley: The letter has evidently been cut off for some cause which is not shown.

The Court: Well, I don't know. Whatever it is he may explain what it is if he knows.

To which action and ruling of the court, the defendants then and there excepted and still except.

Q. What was the last question, reporter, please?

(Question read.)

Q. (Continuing:) And ask you if this is not the printing on some of your letterheads and to explain in view of your answer that you said you had not used the words "Stark trees" in asking people to order from you, what you mean by this expression in the right-hand corner of that exhibit, "Stark trees"—direct from nursery to orchard at half of agent's prices."

A. This is the proof sheet, or sample, a few dozen letterheads that I spoke of this morning that were submitted and not used. I explained Mr. Wilson did not come with us and we took up this green letterhead with the red and black type.

Q. You pretend to tell the court you didn't write any letters on that letterhead?

A. Oh, we had a few dozen of them there we used until we got the other form.

Q. Were you at North Manitou Island, Michigan, August 8, 1912?

A. I think so.

149 Q. As stated on that letter?

A. Yes, sir.

Q. Now, Mr. Stark, I show you plaintiff's Exhibit that is connected with E. W. Stark's deposition on page 5 and ask you if you haven't used the expression on that page "Stark—Ozark trees, hearty, vigorous" and so forth, without using and distinguishing as to what "Stark" it is?

A. Yes, this is our catalogue, 1914 catalogue.

Q. Now I will ask you if that isn't the name you have also carried in the new catalogue which is Defendant's Exhibit No. K on the picture.

A. Yes, we used that "Stark—Ozark trees."

Mr. Matson: I wish to call the court's attention to that fact.

A. We were located in the Ozarks.

Q. You don't undertake to say what Stark Nursery or the connection it is there, do you? The truth of the matter is, Mr. Stark, you know the great value of using the word "Stark" in connection with nurseries, don't you?

A. Why, I have some respect for the value of my name in my business.

Q. Well that respect grows out of the years and years of advertising of the word "Stark" in connection with the nursery business, doesn't it, Mr. Stark?

A. The years and years I have devoted to the business personally.

Q. And that personally achieved, I believe this morning you stated, was while you were connected with the complainant company?

A. I was there a great many years, practically all of my life.

Q. Your two brothers, Edgar Stark and Clarence Stark, first started it after your father's death, didn't they?

A. No.

Q. And then took you in afterwards?

A. No, you continue to mis-state that question. The facts are we three brothers took over the business at my mother's death, jointly.

Mr. Matson: Your Honor, can we have five or ten minutes for consultation? I think we are about through, but we would like to——

The Court (interrupting): Yes, with that in view you may.

Thereupon a short recess was taken and the cross examination was resumed as follows:

Q. Mr. Paul Brown of St. Louis has been one of your financial backers since you started in your nursery, has he not?

A. Yes.

Q. You have been acquainted with him for quite a while?

A. Yes.

Q. Now, you had a conference with Mr. Brown about the effect of any damage that you would do by your new nursery or any other proceedings you might take on the old nursery, did you not?

A. No.

150 Q. You know of a letter that Mr. Paul Brown wrote relative to the effect of your receivership trial and of your proceedings in your new nursery as to what effect that would have upon the old nursery and you get the benefit of it if you hurt your old nursery up there, didn't you?

A. I don't know what letters Mr. Brown wrote.

Q. At the time your deposition was taken in St. Louis in the re-

ceivership case, didn't you admit that you knew of that letter and that you and Mr. Brown had had a conversation along that line?

A. What letter are you talking about?

Q. Now, if you could do anything to injure the old nursery, the complainant nursery in this case, that might put it out of business in any way, that by virtue of the name "Stark" and your prestige in the matter, that their former business would be moved to your business down here, and you would get the benefit of it?

A. As a large stockholder in Stark Brothers Company, my aim and interest has been to conserve that business and protect it from incompetent management and make it profitable so it would pay dividends that are unpaid.

Q. And didn't you admit there in St. Louis at that time as a result of this case that if you could get that business put out of there, Stark Brothers Nurseries & Orchards Company, that you would get the benefit of that down there?

A. I have no desire to put that company out of business. There is plenty of room for all the nurseries.

Q. I will ask you the question again, as you won't answer it.

The Court: State what you know about such a letter, if you know anything about it, Mr. Stark.

A. I don't know what he is talking about. All I know is, I want that business conserved and properly managed, the business protected.

The Court: You have got that letter?

Mr. Matson: I don't know whether I have got the letter or not. All I know is it has got statements of Mr. Stark's conversations had with Mr. Brown in that letter, the effect it would have upon the old business and the new business, if he could succeed in the receivership case and otherwise by doing away with the old nursery.

Mr. Wilfley: To whom was that letter addressed?

Mr. Matson: Mr. J. C. Beggs, treasurer of the International Shoe Company and now a member of the Board of Directors of the Reserve Bank, St. Louis.

Mr. Wilfley: Is he connected with the plaintiff company?

Mr. Matson: Not at all. Not connected with the complainant company. Just simply a question, as to the effect it would have and why W. P. Stark could afford and would get the benefit of putting this old nursery out of business?

Mr. Wilfley: If the court please, I can't see how any letter of Mr. Paul Brown——

151 The Court (interrupting): Not unless the defendant was a party to that plan, had cognizance of that letter and admitted that that was a part of the plan.

Mr. Wilfley: Well, he has testified just to the contrary.

Mr. Matson: I understand you to say you knew nothing about it, had no such conversation with Mr. Paul Brown?

A. I have no recollection of such a conversation.

Q. Now, Mr. Stark, I notice in your 1917 Year Book you publish the pictures of J. J. Hazen, J. H. Hale, and E. W. Hazen, along with a picture of your son, William H. Stark on the second page of that Year Book. What connection have they with your company at this time?

A. They are associated with me.

Q. And have an interest in your company?

A. Yes.

Q. Where does Mr. Hazen live?

A. There are two Mr. Hazens there. Which do you refer to?

Q. Well, J. J.

A. Mr. J. J. Hazen is a resident of Neosho, Missouri

Q. How long have they been interested with you?

A. Mr. J. J. Hazen has been there about one year this July or August, I think.

Q. How long has Mr. E. W. Hazen been interested with you?

A. He has been interested there for something over a year, I think.

Q. Where does he live?

A. Mr. Edward W. Hazen is at Hadden, Connecticut. He was formerly in business in New York and has a country home out there at Hadden and he is one of the directors of the Curtis Publishing Company.

Q. Mr. J. H. Hale, is the Hale peach we have been talking of

A. Yes.

Q. He is interested in your company?

A. Yes.

Q. And has been since the inception of it, hasn't he?

A. No.

Q. How long since?

A. Well, he has taken his stock in the business about a year, been in it about a year.

Q. About a year?

A. Yes, about a year.

Q. Prior to the time this gentleman came in were you and your son the exclusive owners of the William P. Stark Nurseries?

A. Yes. I might state there were a few shares there among my family, but practically my son and I held all the stock.

Q. Take the witness.

Redirect examination.

By Mr. Willfley:

Q. Just one or two questions. Mr. Stark, Mr. Matson asked you about Mr. Culver as a director of the plaintiff corporation. He succeeded me on the board of directors, didn't he?

A. Yes, sir.

Q. Now, as a matter of fact, he was elected by the votes of
152 the others besides yourself?

A. Yes, sir.

Q. I resigned before the end of the year?
A. Yes.
Q. And the then Board of Directors elected Mr. Culver to succeed me, is that right?
A. Yes, sir.

Q. That is all.

Recross-examination.

By Mr. Matson:

Q. That was by mutual agreement and it was understood that Mr. Wilfley while there was really there as your representative, and while Mr. Culver is there he is really there as your representative?
A. I elected Mr. Culver at the annual election. I had nothing to do with what transpired there in the interim.
Q. When you say "you elected him" you mean by accumulative votes of your stock?
A. Yes.
Q. And he is still permitted and remains there as chief accountant of the department as far as you know?
A. I suppose so.

Q. That is all.

(Witness excused.)

WILLIAM H. STARK, called as a witness for the defendants, being under oath, testified as follows:

Direct examination.

By Mr. Wilfley:

Q. State your name, age, business and residence.
A. My name is William H. Stark; 30 years old, the nursery business. I live at Neosho, Missouri.
Q. How long have you lived at Neosho, Missouri?
A. About four years.
Q. How long have you been in the nursery business?
A. I have been actively engaged in the nursery business since I left school about six or seven years ago; eight years ago.
Q. What school did you attend?
A. Commercial University is where I finished.
Q. Did you take a special course there?
A. Took the course in horticulture.
Q. To prepare yourself for the nursery business?
A. Yes.
Q. And to make that your life work?
A. Yes.
Q. It has been testified, Mr. Stark that you at one time were assistant treasurer of Stark Brothers Nurseries & Orchards Company. Do you know about when you went with that company?

A. I went with that company about, June, 1909.

Q. Do you know about what time you left the company?

A. It was along in the late winter of 1912.

Q. State whether or not there was considerable friction at that time which has already been testified to by Mr. E. W. Stark, and your father, Mr. William P. Stark?

A. Yes.

Q. You mean by the late winter of 1912, Mr. Stark, you mean just before the spring of 1912?

A. Yes.

153 Q. Just so we get that. State whether or not there was friction and unpleasantness there?

A. Yes; there had been periods of friction and then they would get together and then friction would break out again.

Q. Yes. Why did you sever your connection, Mr. Stark? On account of this friction?

A. Because conditions had got to be such there I could not see where I could work and live under those conditions.

Q. Mr. Stark, there was some testimony by your uncle, Mr. E. W. Stark, with reference to Planting Book; state whether or not the work of preparing that Planting Book had been assigned to you?

A. That work was assigned to me and I wrote the manuscript, the large part of it, in the fall of 1911. We had come back after we had been away, that is, father, Earl Wilson and myself had been away, and they had—that is not connected with the company—they had got together and formed an agreement we thought would enable us to work together, and that was a part of the work I was to agree to do.

Q. Well, that Planting Book was prepared by you at the direction of whom? Was it understood by Mr. E. W. Stark you were to work out that Planting Book?

A. It was.

Q. Now, Mr. E. W. Stark testified that there was dissatisfaction about the cover of the Planting Book and that it was changed. Do you know how many Planting Books with the original cover was sent out?

A. There weren't any sent out with that cover that he objected to. There was a small number came down from the printers and he saw them and held them up.

Q. Well, had you taken up that question of that Planting Book with anybody else, any other officer of the company before that time?

A. Yes.

Q. With whom?

A. With my father.

Q. And who else?

A. And Mr. E. W. Stark knew that I was working on it.

Q. Well, state whether or not those changes were made to the satisfaction of Mr. E. W. Stark before the books were actually sent out?

A. Yes; there were certain objections made to the book, changes

were agreed upon, and the printers were instructed as to making those changes.

Q. State whether or not at the time you prepared that Planting Book there was any prospect or plans of establishing the nursery which you later established?

A. At the time of doing that work I believed that the agreement that brought us together would be permanent.

Q. Your idea was you would stay with the company?

A. My idea was I would stay with the company there.

Q. Now, when did you go to Chester, about when, as nearly as you can state? What time in 1912? You state you went down there in 1912; do you remember about what time?

154

A. I went down, I moved down there along in April, I think.

Q. State whether or not there had been any friction before that time?

A. There had been friction before that time.

Q. Now, Mr. Stark, had you had a conversation, any conference with Mr. E. W. Stark, in which——

A. Well, I had been down to Chester before I moved there in April. I was there along in the midwinter and some time after I had gotten back the question was brought up as to—by Mr. E. W. Stark, as to what I had done there and what my intentions were, and I gave him to understand that I was going to leave, and told him that if he wanted me to stay there until the end of the business season, which was through the spring, I would stay as long as I could. Later the condition of friction developed, and I think as he said in his deposition, there was pressure brought and a written resignation was turned in.

Q. Do you know about what time you sent in your resignation?

A. I don't know just what time it was. It was along in the spring some time.

Q. Now, Mr. Stark, there has been some question about some stationery with the words, "William Stark Nurseries, Chester, Missouri." State whether or not you got out that stationery?

A. I did.

Q. What was your purpose in using the name "William Stark"?

A. Well, my name was William H. Stark, and I naturally wanted to use that name in the business. I had come to realize during that winter and spring that I could not stay with the old company. I knew that, or felt I knew, that I would be forced out. There were lots of the younger boys coming in there, there was more or less envy and jealousy developing there among the younger men, and I wanted to get out, because—I couldn't live there under those conditions. I had that stationery printed and made as different from the old company as possible. I had the name of William Stark Company; that was my name. Father didn't consider coming out at that time. I told him that it was only a question of time until I would have to get out or I would be put out. He said, no; he had spent his life there and he expected to finish it there.

Q. Well, did you think—did you want him to join you with your William Stark Company?

A. I did.

Q. His name was William Stark also?

A. It was.

Q. The only difference between the name is the middle initial, is that correct?

A. His middle initial is P. and mine H.

Q. Now, Mr. Stark, state about this Stark City. How much of a place was that when you went there? How much of a place is it?

155 A. Stark City was a new town on a railroad. It had just been built through there several years. It was being opened up and boomed by a townsite company. It was a small town, several hundred people. It had a bank and a number of general stores, lumber yards, elevators.

Q. Well, how did it come to be changed from Chester to Stark City?

A. When the people of the town knew that I was coming down there, they were very glad. I think it was the banker said they would like to show their appreciation in some way, and I don't recall just how the circumstances came up, but he in a conversation spoke of the name of Chester. The town had only been there for about, I think, two years, and he said there was some confusion in the mail, of, I think, Chester, Kansas, and Chester, Illinois, and during that conversation the question came up of changing it, and I afterwards learned that he took it up and had the petition passed and signed as has been submitted here in evidence?

Q. Of course, you were wiliing for the change?

A. I was glad to have the change made. I appreciated it.

Q. When did you acquire that land, the land upon which your nurseries are established at Stark City, Mr. Stark?

A. I bought it along in the spring of 1912.

Q. How many acres have you there?

A. We now own about 375 acres there, and since I turned over my holdings to the company, they have acquired leases to about 120 more.

Q. Do you employ a considerable number of people there?

A. About 100 men, more than that now, I think, on the payroll at that place.

Q. Now, I overlooked the question of how did you come to establish your offices at Neosho?

A. When I moved down to Chester, which is now Stark City, I felt that the best way was to have everything there where I could watch it, and I had plans made for a packing house, paid an architect in Chicago quite a bit of money to draw up plans, direct the grade for a switch and put down wells. I think I spent some $800.00 getting things in shape to put a packing house out at Stark City. I had the office in there and oh, six or eight girls, from the time I went down until about a little over a year and a half, and then after I had been there awhile and started this work on the packing house,

at a meeting at Neosho—I forgot who it was, some real estate men, I think—tried to interest me in a packing house there or buildings that could be used for a packing house. They were large buildings adapted to our purposes and they made favorable terms to us, and so the packing house was established at Neosho. Later, several years later, a small farm was leased there for growing some stock.

Q. Now, this place you have at Neosho, as I gather from your answer, was built for some other purpose?

A. Yes, sir.

Q. Originally?

156 A. Yes, sir. The building was built and standing idle at that time, although I didn't know of it until after I had been there and spent the money in starting the work on the packing house and office at Stark City.

Q. And the reason why you accepted that was because of the very favorable terms you got on this house?

A. Yes; it was a great deal less than we could have built.

Q. How much of a building was it? Of what character?

A. Why, it is a large brick building, that is about 18-foot ceiling in the clear, covers about an acre. The property was represented to us as costing $50,000.00.

Q. Is it on the railroad?

A. It is on the railroad and has good switching facilities which were already maintained by the railroad.

Q. How many railroads are there at Neosho?

A. There are three.

Q. How long did you live at Stark City or Chester?

A. Something over a year and a half.

Q. Before you moved to Neosho?

A. Before I moved to Neosho.

Q. And your offices were originally established at Chester or Stark City?

A. Yes, sir. We had no idea of being at Neosho. In fact, I intended to live out there and fix up a house to live in when I went down.

Q. You also have some land, I believe, at Neosho?

A. There is a farm that is leased there. We don't own any there now.

Cross-examination.

By Mr. Matson:

Q. You heard the letter that I read that you wrote to Mr. Basford, didn't you?

A. I did.

Q. Do you recall that letter?

—. ——.

Q. The letter is dated July 11, 1912.

A. Yes; I wrote that letter.

Q. Now, you state in that letter among other things: "I have pur-

posely kept my own signature off the petition." Why did you do that?

A. That change was made as a compliment by the people of the town there. I didn't think it was fitting I should put my name on it.

Q. Mr. Stark, you don't want it understood, do you, that the people of the town, without any suggestion on your part, in any way, shape, or form, either yours or your father's, came to you and proposed to change the name of their town that had been running there for years, and later everything there was arranged to change it to Stark City?

A. That was volunteered.

Q. That was volunteered after you had made that suggestion, wasn't it?

A. Repeat the question please. (Question read.) I explained that in the direct. I can repeat it here if you wish it.

157 Q. Well, I will ask the question direct. You stated that without any solicitation on your part or on your father's part that the people of Chester changed the name to Stark City?

A. I say that without any solicitation on my father's part they did. I say that in a conversation which I had with the local banker there that they were talking about the confusion of Chester, Missouri, and several other places, Chester, Missouri, being a new town. That during that conversation it came up in some way of changing the name, and I don't recall just what that suggestion was or how it took part, but the banker, or somebody else, passed the petition and I never saw it again until they brought it and said that they had——

Q. (interrupting): How did they come to bring it to you if they were the ones soliciting it to start with?

A. Because they thought I would be able to present it to the Postoffice Department.

Q. If anybody in the town now had signed it and everything else, they couldn't send it on themselves, but had to bring it to you to send.

A. Well, I told them I could get it to Mr. Clark.

Q. The truth of the matter is, Mr. Stark, you wanted the name changed to Stark City?

A. I did. I appreciated the compliment.

Q. You knew if it was changed to Stark City and you had anything like a nursery there, there would follow what has followed, to-wit, a mix-up of the two nurseries?

A. No.

Q. It has followed, hasn't it ?

A. I don't consider there is any mix-up in the two nurseries.

Q. You don't consider it?

A. No.

Q. You knew that at one time the complainant company had advertised in their literature "Stark Postoffice," didn't you?

A. No. I know that they listed Stark where they had a branch plant.

Q. Well, now, if you will listen to my question I think we will get along, if you will answer it. You knew they listed in their literature

while your father was there in connection with that company, the name "Stark" and also the post office at one time in Pike County, Missouri, didn't you? You know that they also listed the name of Starkdale, which was a post office in Lincoln County, Missouri, at the time that your father and you both were connected with the complainant company?

A. No.

Q. Was it in the southern part of Pike County?

A. Starkdale was never a post office when I was connected with the company.

Q. Well, then, it was prior to your connection with the company. You knew it was in the literature that was being sent out over the country, didn't you?

A. I knew they listed it. They had no nursery at the time I was connected with the company.

Q. And you knew every association, connection with the
158 word "Stark" had been used in addressing letters to the complainant company?

A. What is that?

Q. Read the question, please.

(Question read.)

A. Why, no. I do know that the different combinations, "Stark Nursery" and "Stark Brothers" have come there.

Q. And you knew that there were a great many letters came to that company there addressed to other places than Louisiana, Mo., didn't you?

A. No; I have heard of one or two, but I don't recall of ever seeing any.

Q. You had nothing to do with the mail department there?

A. I handled a good deal of the mail there at the time I was there, yes.

Q. And you don't recall anything of that kind?

A. No.

Q. You have gotten them at Neosho, Missouri, haven't you?

A. Got what?

Q. At Stark City, Missouri, mail addressed to Stark Brothers?

A. I did a few letters that came to Stark Brothers and it has been our impression that they were inspired by somebody connected with the company. In any case we have been very particular to forward anything that was at all doubtful as to whether it belonged to us or not.

Q. And that was brought about by the use of the words "Stark City"?

A. I don't know that it was, no.

Q. When you say you resigned the office of assistant treasurer, Mr. Stark?

A. I don't know the exact date. I told verbally I was going to leave and then later made a written resignation. I don't know the date of that.

Q. Well, you had been down there looking after this plant and

this Stark City post office matter had been started prior to the time that you resigned, hadn't it?

A. I think not. I resigned some time before that.

Q. Don't you know you resigned April 2, 1912?

A. That is when I put in the written resignation——

Q. (interrupting): The written resignation——

A. (interrupting and continuing): That came some time after I had resigned verbally, and as I recall those circumstances I was in an elective office, being assistant treasurer, and it seemed as far as I could tell that some kind of written resignation was wanted; that the verbal was not sufficient for their record.

Q. Well, this petition, you sent it in to the department, or to Mr. Bassford to be sent to the department, didn't you, asking that the name of Chester be changed to Stark City?

A. Yes, I sent that in. I sent that in I think with this letter. That is the way the letter reads.

Q. And that is the petition that you say that you kept your signature off the petition purposely?

A. Yes, sir.

Q. This petition is dated March 28th, 1912, isn't it?

159 A. Yes, sir.

Q. Then you must have been there prior to March 28th, 1912, consulting with this banker, and others about the change of this name, weren't you?

A. Yes.

Q. Now you drew salary from this company as assistant treasurer up to the time of the written resignation, didn't you?

A. I drew salary until I stopped work there. Some time in the latter part of March or April; I don't know the date.

Q. Well, whatever the date of your resignation was?

A. Up until the time, up until a few days that I packed up my household goods I drew salary from Stark Brothers.

Q. You were on the payroll of the complainant company at the time of arranging for this change in the name to Stark City, weren't you?

A. I probably was.

Q. Your father was obtaining specimens of fruit and other things as referred to in a letter this morning and sent it to you down there during that time, wasn't he?

A. I don't recall.

Q. You don't recall that letter at all?

A. No.

Q. Do you recall any instance in which he sent matters to you from the company?

A. I don't recall it.

Q. He was backing you financially?

A. He was endorsing my notes and I was getting money from other sources.

Q. Before I forget it, Mr. Stark, you said you had certain interests in this company you disposed of. When did you dispose of the interest in the William P. Stark Nursery Company?

A. I held all real estate until after the business was organized and I had been there several years.

Q. Well, did you dispose of the interest recently, any part of it?

A. What do you mean by recently?

Q. Well in the last year?

A. I think not.

Q. In the last two years?

A. Yes.

Q. Who did you dispose of it to?

A. I sold some of it to Mr. E. W. Hazen, Hadden, Connecticut.

Q. How much?

Mr. Wilfley: Well, now we object to that, Your Honor. I can't see that that is material.

The Court: I don't see anything in it unless it affects the parties to the suit, something of that kind. Is this a corporation, or a firm?

Mr. Wilfley: It is an unincorporated association.

Mr. Remick: What you call a business trust, I think.

Mr. Matson: Now, Mr. Stark, you said something about the friction there in 1911. Now in the summer of 1911, prior to the election there in June, 1911, you and your father and his son-in-law, or about the time of the election, resigned, didn't you?

A. You mean in the spring of 1911?

Q. Yes, wasn't it just about election, Mr. Stark, when you
160 three handed in your resignations immediately after the directors' election in 1911?

A. I don't recall positively. There was some resignations handed in before that meeting. I don't recall just how long.

Q. Don't you recall that at that meeting your father had wanted himself elected and you elected and Mr. Wilson elected to the Board of Directors?

A. I don't think we attended that meeting.

Q. In 1911 just before the—when you were trying to arrange for that meeting in 1911, don't you remember that your father insisted that you and himself and your brother-in-law, Mr. Earl Wilson, be elected members of the Board of Directors?

A. As I recall that meeting, we didn't attend it.

Q. I am not asking you at that meeting. Before that election, don't you remember that your father insisted upon you three being elected members of that Board of Directors?

A. There were some suggestions made along that line.

Q. And there were only four directors of that company? Isn't that so, of this complainant company?

A. Yes.

Q. Now then they were proposing to elect—E. W. Stark was now president, and he wanted then you three elected on that Board which would have given him the control of that nursery, wouldn't it, if you three had been elected?

A. Yes, and then along about that time there were other suggestions made that they elect two each.

Q. That would have left out C. M. Stark's family entirely, wouldn't it?

A. What would you mean?

Q. If you had been elected and your brother-in-law had been elected and W. P. Stark had been elected and E. W. Stark had been elected, that would have left out the third brother, C. M. Stark, and his family, wouldn't it?

A. Mr. C. M. Stark at one time wanted me to be——

Q. (Interrupting): I am not asking you that question, Mr. Stark.

A. It would not have left them out because at one time he wanted me to be his director, to represent his interests, and was suggesting I should to eliminate the friction—that I should be elected president.

Q. That you should be elected president?

A. Yes.

Q. That was after Mr. Stark's breakdown and that was at the time that your father was trying to get hold of that company by the election of you three men, wasn't it?

Mr. Wilfley: Now, we object to this, Your Honor, because it assumes his father was trying to get hold of the company. There is nothing in this record, and in fact it isn't true that he was trying to get hold of the company.

The Court: Well, as far as that statement is concerned, of course it is immaterial. If you have got anything here to show that was contemplated, why it can be shown for what it is worth.

161 (To which action and ruling of the court the defendants then and there duly excepted and still except.)

Q. What do you say about that?

A. Read the question please. (Question read.) There was a discussion there between the different members of the firm as to the election of directors.

Q. And they didn't, and the other stockholders wouldn't consent to that, would they?

A. No, they wouldn't vote their stock that way.

Q. And the result of it was that Mr. E. W. Stark and Mr. Eugene Duncan, and as a matter of fact, your father was voted for at that election by these people?

A. I don't recall that.

Q. You don't recall that?

A. I don't think I attended that meeting.

Q. Well, anyway the nursery there was expected to be handed down from those three brothers, Clarence M. Stark, E. W. Stark and W. P. Stark, and kept for the benefit of their families, wasn't it?

A. I don't know what they expected.

Q. You never heard that talked over at all, did you? Now, Mr. Stark, I hand you what is known as "Authoritative facts on fall planting" that I asked to be marked as plaintiff's Exhibit No. 10,

and ask you if you recognize that as having been sent out by the plaintiff company?

A. I don't recall having seen that. There were a great many pieces of printed matter. It may have been sent out. I presume that it was.

Q. You presume that it was. Now then I call your attention on the third page of that Exhibit No. 10 to this heading of the letter; "The Department of Horticulture, Oregon Horticulture College and Experimental Station, Corvallis, Oregon, June 30th, 1910. Stark Brothers Nurseries & Orchards Company, Louisiana, Missouri," and I will also call your attention to the fifth page of that Exhibit No. 10 to the heading of letter "University of California, College of Agriculture, Berkeley, California, June 21, 1910. Stark Brothers Nurseries & Orchards Company, signed E. G. Wickson, Dean and Director," and also to letter on that last page of this exhibit No. 10, "Seattle, Washington, July 1, 1910. Stark Brothers Nurseries & Orchards Company, Louisiana, Missouri. Signed F. Walden." All three of those letters are published in that Exhibit 10, aren't they?

A. You mean, is this your Exhibit 10?

Q. Yes, sir.

A. Yes, they are there.

Q. I will ask you, Mr. Stark, if what is spoken of there, "The Stark Orchards Planting Book" by William H. Stark, which is plaintiff's Exhibit No. 4 as filed with the deposition of W. P. Stark, if this letter of which I have read the heading on page 3 of plaintiff's exhibit No. 10 in this statement, and which letter is headed "Department of Horticulture, Oregon Horticulture College, Experimental Station, Corvallis, Oregon, June 30, 1910," and the letter that
162 you inserted in your book "Stark Orchard Planting Book" gotten out by you, as I say, is not from the same party, C. P. Lewis, and if the language in so far as it goes of that letter as shown in plaintiff's Exhibit No. 10, and as shown in plaintiff's Exhibit No. 4, attached to the deposition of W. P. Stark, are not the same? In other words, where did you get this letter from, that is signed by C. P. Lewis, dated Corvallis, Oregon, without any date to it at all, if you didn't get it from that previous Planting Book there?

A. These letters are signed by the same parties.

Q. I asked you if you didn't get in the so-called Planting Book, that you say is prepared by you to be sent out over your name, the contents of this letter as shown in this Exhibit No. 10 from Lewis?

A. Will you read the question before that so I can finish answering, please? (Question read.) Let me finish answering this first question. These letters are signed by the same party. There is a similarity in the letter. It reads "Planting Book" with the first paragraph in this leaflet. I don't know where I got them. I don't recall having seen this leaflet but it may have been the same letter.

Q. Now that is true with the other letters I called your attention to in those two last exhibits there, isn't it?

A. That is true in these two exhibits and I will say in this connection that some of those letters were, or at least it was the practice, to copy letters of that kind from publications.

Q. Well you changed the name of them there so it would be addressed to William Stark, didn't you, and so it appears in your name?

A. They were addressed here to William Stark.

Q. And the whole of the letters gone out there, and the whole book as it is sent out by you.

A. That book as sent out was approved by the president.

Q. I didn't ask that question. If that book had gone out as prepared by you, it would have changed the names as appeared in the former literature sent out by this Company, wouldn't it?

A. Yes.

Q. Now, Mr. Stark, I show you what purports to be the original of that letter from Mr. Lewis dated June 30, 1910, and ask you if this is not in your handwriting: "Professor of Horticultural College and Pomology" at the bottom of that letter in lead pencil?

A. I don't think it is.

Q. Whose handwriting is it?

A. I don't know.

Q. That appears in your Orchard Planting Book, don't it, in that way, as though he is the professor of the Oregon Horticultural College and Experimental Station, Department of Agriculture?

A. No, it doesn't appear——

Q. (Interrupting): Did you ever see that letter, the original of it?

A. The pencil notation I referred to here doesn't appear in the printed book.

Q. Did you ever see that letter of Mr. Lewis' of June 30, 1910, which you now hold in your hand?

163 A. I don't recall it but it is quite probable that I might have. I was there. I think I was there at that time.

Mr. Matson: We offer the letter just referred to you by the witness, Corvallis, Oregon, June 30, 1910, signed by Mr. Lewis and show that it is addressed to Stark Brothers Nurseries & Orchards Company, Louisiana, Missouri, and asked it be marked as Exhibit 11.

Mr. Wilfley: We have no objection. I don't think it is competent, relevant or material.

Q. Now a part of this friction that you speak of grew out of these books being issued by you under your name and the changing of these letters that were originally addressed to the complainant Company?

A. There was friction at that time.

Q. You went deliberately to work and took the correspondence of this company and made those changes there in that book, didn't you, and at that time there was friction there between you people and you were thinking about starting a new nursery and getting out?

A. I was not.
Q. None of you were?
A. No.
Q. You had already resigned, hadn't you?
A. No.
Q. You did shortly afterwards?
A. No.
Q. When you all three came back at the same time in September, 1911, didn't you?
A. We didn't all come back at the same time.
Q. How soon afterwards? Did your father come back before?
A. I came back and several weeks later and sometime after that —why I think that gave Mr. Wilson a chance to come back.
Q. Well this controlling of the majority interest in this company, they did everything they could, and took you people back after you tendered your resignation and after these matters had occurred?

Mr. Willfey: Now we object to that, Your Honor.
The Court: Well it appears from the situation already in evidence.

Q. Mr. Stark, how large a city is Neosho, Missouri?
A. I should say about 3500.
Q. 3500. And how large a building is this you say you have there as our packing houses?
A. It covers nearly an acre.
Q. And did you go to Neosho first or Stark City first when you were down there looking around?
A. I went through Neosho. I didn't look around at Neosho.
Q. How did you get any information about Chester?
A. I don't recall. I had some, I had time there between trains, and heard of a new railroad out that way and in transferring trains I knew I could get down on that railroad a distance and then get back and so I just took a train and just simply rode in that direction.
Q. You never heard of Chester before?
A. I don't recall of having heard of Chester before.
164 Q. Now then Stark City—Neosho, you have practically all of your trees that you pack and ship sent to Neosho, Missouri, don't you?
A. Since we secured the packing house down there we haul most of the trees right down there to Neosho.
Q. How tall is this building?
A. It is about 16 feet at the eaves.
Q. Did you ever move to—move your family to Stark City?
A. Yes, they lived there for nearly a year and a half.
Q. At Stark City?
A. Yes, right in a house near Stark City. It is right on one of the farms that I bought. My son was born there.
Q. Your first catalogue that you got out after you went down there, that is marked copyrighted 1912 and which is Plaintiff's Exhibit No. 14, as attached to the deposition of Mr. E. W. Stark, has

this on the first page, hasn't it: "William P. Stark Nurseries. Nurseries Stark City, Missouri. General offices and packing houses, Neosho, Missouri." That is there isn't it?

A. Yes.

Q. Now why didn't you continue advertising Neosho, Missouri, after that time in your catalogues and your packing houses at Neosho, Missouri?

Mr. Wilfley: I submit, Your Honor, some of them do, some of the letterheads do that, show both, and some of the literature shows both. It states specifically the nurseries are at Stark City and the packing houses and offices are at Neosho.

The Court: Well some do and some do not. Mr. Stark said the reason of that was because they were featuring the place in the nursery book.

Q. You have a nursery at Neosho and one at Stark City, haven't you?

A. We have one now, yes, sir.

Q. That is all.

Redirect examination.

By Mr. Wilfley:

By Mr. Wilfley: I just want to ask you one question, Mr. Stark. I think you stated in your cross-examination, but I am not sure, that this petition signed by the citizens of Chester asking that the post-office be changed to Stark City, as I understand, though it is dated March 28, 1912, was enclosed in your letter to the secretary of the Speaker of the House and Representative Champ Clark, dated June 11, 1912?

A. The petition is dated March 28; the letter is dated July 11, 1912.

Q. The petition was enclosed in the same envelope with this letter which has already been read in evidence?

A. It was.

Q. That is all, Mr. Stark.

(Witness excused.)

Mr. Wilfley: I want to substitute a copy of the J. H. Hale contract for the original since this original contract has not yet expired and we want to keep it.

165 Mr. Matson: That is understood, Mr. Wilfley.

Mr. Wilfley: Well I just want to change it now. We have the copy here.

The Court: Do I understand the defense has closed?

Mr. Wilfley: Yes, sir, with the exception of that.

The Court: There is no rebuttal. It is announced there is no rebuttal.

Mr. Wilfley: If the court please, we desire to demur to the evidence in this case.

The Court: Well that amounts practically to an argument on the case?

Mr. Wilfley: Yes, sir. We desire to demur to the evidence in this case for the reason that the evidence introduced in this case fails to show that there was any infringement of plaintiff's trademark, that it fails to show any unfair competition. Further, we desire to renew the demurrer that is set forth in our answer, to-wit, that the petition——

The Court: You don't need to do that because it is overruled and excepted to.

Mr. Wilfley: No, that never has been——

The Court: Oh, it has not.

Mr. Wilfley (continuing): That was done in this way, they filed a motion to strike and you overruled their motion.

The Court: Yes. I thought that was really a motion to dismiss. Where is my memorandum in this case? Didn't I write a little memorandum?

Mr. Wilfley: I have a copy of it somewhere.

The Court: I want to refresh myself on that. Let me see it. I said: "The motion to strike, is, therefore overruled as well as all objections to the sufficiency of the bill which were discussed in connection therewith. The parties will proceed to prove on the issues tendered." That amounts to overruling your demurrer, and, of course, if that is in error it is preserved in the record without any renewal of that.

Mr. Wilfley: The demurrer we desire to interpose at this time is to the evidence.

The Court: Yes, well you may. I will hear you on that the—on the demurrer.

Defendants rest.

Thereupon counsel for defendants proceeded to present an argument on the demurrer.

Case closed.

166 EXHIBIT "A."

The J. H. Hale Co.
Growers of Fruits and Nursery Stock.
South Glastonbury, Conn.

(In left hand corner:) Hale Georgia Orchard Co., Ft. Valley, Ga.; Hale & Coleman, Seymour, Conn.; Hale & Pero, So. Glastonbury, Conn.

(There is a red seal here with "Hale's Fruits" in large letters printed upon it. The rest of the type is too small to be legible.)

With four farms and three thousand acres of paying fruit orchards, we know the best varieties of Fruits for actual money making, not experimenting.

(Stamped with rubber stamp: "Answered Aug. 29, 1911")

August 26, 1911.

Long Distance Telephone: Glastonbury Central. Telegraph Address: "Hale, Hartford."

Mr. William P. Stark,
Louisiana,
Missouri.

DEAR MR. STARK:

Yours of the 23rd received. Now there's no talking on your part about not being able to get away and see the peaches here is going to count a little bit. To see a specimen or two of our peach by mail will not interest you properly, nor do any good in a business way. You have just got to leave wife, family, business and everything else and hike over here next week, when I wire you to do so. My judgment now is that you ought to be here from the first to the 5th of September. We have just had bully rains that set the peaches growing and while they may not come up to their very best, I still feel that we are going to have something to show you the likes of which you never saw before; so there is no saying no about it, if you expect to be interested in this peach.

Of course, if you do not want a good thing, the best there is in America, why stay at home and be as good a boy as you can, but if you are after the real thing, I think here's the place to see it.

Train to Hartford and electric car to Glastonbury.

I will wire you next week just when to come.

Yours very truly,
(Signed) J. H. HALE.

167 EXHIBIT "B."

No. 92478.

THE UNITED STATES OF AMERICA:

To all to whom these Presents shall come:

This is to certify that by the records of the United States Patent Office, it appears that William P. Stark Nurseries, of Stark City, Missouri, did on the 25th day of February, 1913, duly file in said office an application for registration of a certain Trade-mark for Peach Trees, that they duly filed therewith a drawing of the said Trade-mark, a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and have duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the Commissioner of Patents.

And, upon due examination thereof, it appearing that the said *applications* are entitled to registration of their said Trade-mark under the law, the said Trade-mark has been duly registered to William P. Stark Nurseries, their successors or assigns, in the United States Patent Office, this eighth day of July, 1913.

This certificate shall remain in force for twenty years, unless sooner terminated by law.

In testimony whereof, I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the city of Washington, this eighth day of July, in the year of our Lord, one thousand nine hundred and thirteen, and of the (Seal) Independence of the United States *and* one hundred and thirty-eighth.

(Signed) C. C. BILLINGS,
Acting Commissioner of Patents.

United States Patent Office.

William P. Stark Nurseries, of Stark City, Missouri.

Trade-Mark for Peach-Trees.

92478.

Registered July 8, 1913. Application Filed February 25, 1913.

Serial No. 68732.

Statement.

To all whom it may concern:

Be it known that we, William P. Stark Nurseries, a firm domiciled in Stark City, Newton County, Missouri, doing business at same place, and composed of the following members, W. P. Stark and W. H. Stark, citizens of the United States of America, have adopted and used the trade-mark shown in the accompanying drawing, consisting of the facsimile of the signature of J. D. Hale, for peach trees, in Class No. 1, Raw or partly prepared materials.

The trade-mark has been continuously used in our business since November twenty-first nineteen twelve.

168 The trade-mark is applied or affixed to the goods by placing thereon a printed label on which the trade-mark is shown.

WILLIAM P. STARK NURSERIES,
By W. J. STARK,
A Member of the Firm.
J. H. HALE.

Declaration.

STATE OF MISSOURI,
County of Newton, ss:

William H. Stark, being duly sworn, deposes and says that he is a member of the firm the applicant named in the foregoing statement; that he believes that the foregoing statement is true; that he believes said firm is the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his

knowledge and belief, has the right to use said trade-mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said firm in commerce among the several states of the United States, that the description and drawing presented truly represent the trade-mark sought to be registered; that the specimens show the trade-mark as actually used upon the goods.

WILLIAM H. STARK.

Subscribed and sworn to before me, a notary public this 20th day of February, 1913.

[L. S.] GEORGE SWINDLE,
Notary.

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

EXHIBIT "D."

being a wood tag measuring 3-½" x 5/8", on one side is printed as follows—

: Genuine :
: Peach J. H. Hale :
: From Louisiana, Mo. :

and on the opposite side,

: Guaranteed by :
: Stark Bro's :
: World's Largest Nurseries :

EXHIBIT "J."

Post Office Department.

Office of the Solicitor.

Washington, March 1, 1915.

Mr. William P. Stark,
Neosho, Missouri.

SIR:

I am in receipt of your communications of the 18th and 23rd ultimo, with which is submitted a copy of a letter written by
169 Stark Brothers Nurseries and Orchard Company of Louisiana, Missouri, to Mr. T. M. Hudson, in which the following statement is made:

"We want some one living at Stark City to purchase a post office box in the Stark City post office in the name of Stark Brothers Nurseries and Orchard Company, and then all of our mail will be put into this box. What we would want you to do would be to forward this

mail every day or two to Stark Brothers, Louisiana, Missouri. It would require very little of your time, but we would not want any one to handle this but some one on whom we could absolutely depend, so I hope that you will be able to attend to this for us. We will be willing to pay you well for your time."

The information before this office is that the William P. Stark Nurseries are located at Stark City, and that Stark Brothers Nurseries and Orchard Company never had an office or representative at Stark City.

I will communicate with the postmaster at Stark City regarding the matter, and suggest that you consult paragraph 4, Section 611 of the Postal Laws and Regulations at the post office.

Respectfully,
(Signed) W. H. LAMAR,
Solicitor.

(On the opposite side of the sheet of paper on which the foregoing letter is written is the following note written in lead pencil).
Sec. 611—Par. 4.

Attempts to secure the mail of an established house, firm, or corporation through the adoption of a similar name should not be recognized when disputes arise between individuals, firms, or corporations as to the use of a name or designation. Matter addressed to a street number or building should be delivered according to such address. When not so addressed, the mail should be delivered to the firm or corporation which first adopted the name of the address at that place.

EXHIBIT "K."

(The following is an excerpt from Exhibit "K" appearing on page 44 of the Exhibit and marked with brackets in pencil:)

No Connection with Any Other Concern.

The William P. Stark Nurseries deal direct with the planters. We do not have agents, and we never have had agents; any one representing himself to be our traveling agent is a fraud. The William P. Stark Nurseries is not connected or related in any way with any other nursery with similar name. We do business under the name of William P. Stark Nurseries, and no other

170 EXHIBIT "P."

United States Patent Office.

Stark Bros.' Nurseries & Orchards Co., of Louisiana, Missouri.

Trade-Mark for Fruit-Trees, Fruit-Plants, and Hardy Ornamentals. 115,549. Registered Feb. 20, 1917. Application Filed February 21, 1916. Serial No. 93030.

Statement.

To all whom it may concern:

Be it known that Stark Bros.' Nurseries & Orchards Co., a corporation organized and existing under the laws of the State of Missouri, located in the City of Louisiana, County of Pike, State of Missouri, and doing business in said city, has adopted for its use the trade-mark shown in the accompanying drawing, for fruit-trees, fruit-plants, and hardy ornamentals, in Class 1, Raw or partly-prepared materials, no claim being made to the words "Stark-Trees," "Stark Trade-Mark," and "Fruit" apart from the mark shown in the drawing.

The trade-mark has been continuously used in the business of said corporation and its predecessor in business, Stark Bros.' Nursery Co., since September 1, 1900.

The trade-mark is applied to the goods or to the packages containing the same, by placing thereon a printed label on which the trade-mark is shown. The trade-mark is also used in connection with the cars in which the goods are shipped.

Applicant is the owner of the trade-mark No. 92282, registered June 24, 1913.

STARK BROS.' NURSERIES & ORCHARDS CO.
LLOYD C. STARK.

(At this point there is a cut of a black bear with the following printed upon it):

Stark Trees.

Bear Fruit.

Stark Trade Mark.

Declaration.

STATE OF MISSOURI,
County of Pike, ss:

Lloyd C. Stark, being duly sworn, deposes and says that he is Vice-President of the corporation, the applicant named in the statement filed in the Patent Office Feb. 21, 1916, Serial No. 93030; that he

believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several states of the United States, and that the description, drawing and specimens
(or facsimiles) presented truly represent the trade-mark
171 sought to be registered, and that the specimens show the mark as actually used on the goods.

LLOYD C. STARK.

Subscribed by and sworn to before me, at Louisiana, Mo., this 6th day of November, 1916.

J. F. CULVER,
[L. S.] *Notary Public.*

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

EXHIBIT "Q."

Stark Bros.' Nurseries & Orchards Co.

(Established 1816.)

General Nurserymen.

General Offices & Home Nurseries, Louisiana, Missouri.
Branch Nurseries: North Girard, Erie Co., Pa.; Dansville, N. Y.; Huntsville, Ala.; Fayetteville, Ark.; Marionville, Mo.

Growers of Fruit Trees, Fruit Plants and Hardy Ornamentals.

Louisiana, Mo.

Important to you: Buy Stark Trees direct—No agent's Commission: The wholesale catalogue enclosed saves you agent's commission of from 20% to 40% and enables you to get genuine Stark Trees direct from our nursery at wholesale prices.

The Extra Profits Are Yours: You can now get Stark Trees, plants and shrubs—from the Largest Nursery in the World—shipped direct to your orchard. You are the first and only man to open the box. You save all "Extras," no middleman's profit, no tree agent, no deliveryman, no chance of mixing labels, no chance of drying out your trees, for Stark Bros.' world-famous "Round-the-World Pack" brings them direct to you just like they came out of the ground—vigorous, moist, fresh and ready to grow.

Our Progressive Methods Have won: This great 100-year-Old Nursery of ours still grows and prospers because we have kept before us the welfare of our customers. We have been up-to-date, alert, ready to take up and use every good new idea in our system of tree

growing. That is why Our 100 Years means so much to you when buying trees. Strength and sturdiness of Stark Trees is not an accident. Stark Bros.' "Know-how," the Stark Growing Plan, combined with 100 years of experience makes possible the remarkable vigor and strength of Stark Trees.

Stark Bros.' first consideration is quality. Every tree must measure up to the high Stark Standard. Next, we reduce the price to you by growing millions.

172 Expert Advice: In addition to offering you Close Prices and Direct Shipment we offer you the Help and Advice of trained Orchardists in the selection of the proper varieties for your section, in the preparation of the soil, in planting, cultivating, pruning, spraying—in every orchard operation. We make no charge whatever for this service and it is given freely, no matter if you plant only one tree. This service is invaluable, for it comes from the most successful orchardists and nurserymen in the U. S.

The Big Money-Makers: Stark Bro's special varieties are the prize-winners and money-makers of American Orchards: Many sorts are trade-marked for your protection. The great "Stark Delicious" (Trade-Mark) apple grown on Stark Trees by a Stark Bros.' customer in Saratoga Co., N. Y., in competition with the World at the great Panama Exposition, won the Gold Medal. Plant these leaders: Stark Delicious, Stark King David, Black Ben, Stayman Winesap, "Double-Life" Grimes Golden, Senator, Wilson Red June and Liveland Raspberry apples; Stark Early Elberta, J. H. Hale, Red Bird Cling, Alton, Stark Summer Heath, Krummel October and June Elberta peaches; Gold, Omaha, Mammoth Gold, Duarte, Stark Green Gage, Early Gold (Shiro) and America plums; Lincoln, Bartlett and Anjou pears; Van Deman quince, Stark Montmorency cherry and scores of others. Plant these Stark Money-makers. Remember, our propagation is dependable, and our strains are from the best orchards in America and Foreign Lands.

Larger Trees at Lower Prices: Because of our improved methods and the unsurpassed growing season we are enabled to offer you extra large apple trees at the price of the smaller trees. (Note the "Special Contennial Price Offer inserted on page 13). You get 3 to 4 ft., apple at the price of 2 to 3 ft.; 4 to 6 ft., at the price of 3 to 5 ft. Here is your chance to get extra size trees without additional charge.

Free Tree Offer: It will pay you to order by return mail. Note the Free Offer Coupon. Use the order blank enclosed and mail at once. You will get clean, healthy, vigorous trees and they will be specially selected and packed for shipment by experts. This method of handling costs you nothing, but it's worth real money to you in profitable crops and young bearing vigorous orchards.

Yours very truly,
(Signed) E. W. STARK,
President.

P. S.—Warning: We no longer have offices at our branch nurs- Be sure to send all mail to Louisiana, Mo.

173 EXHIBIT "R."

(This is copy of an envelope addressed to W. P. Stark, Neosho, Mo., with the following printed matter at the upper left hand corner):

(Cut of Black Bear with following printed matter):

Stark Trees Bear Fruit.

Stark Trade Mark.

(Underneath Cut):

Stark Bros.'

Nurseries & Orchards Co.

(Established 1816.)

General Nurserymen,

Louisiana, Mo.

(Postmarked):

Louisiana June 18 4-PM 1917 Mo.

EXHIBIT 4.

William P. Stark Nurseries.

Orchard Experts and General Nurserymen.

Stark City, Missouri, U. S. A.

March 18, 1918.

DEAR FRIEND:

We have gotten out a new cloth-bound book—a modern, practical, fruit-growing text-book. It contains 88 pages, and in it we have put not only the best of our 35 years' experience in fruit growing, but the cream of the best tested, proved, money-making methods of the foremost fruit-growers of the country-methods which have made fortunes for the originators, and which heretofore have not been generally known.

The name of this book is "Inside Facts of Profitable Fruit-Growing." It is profusely illustrated, handsomely printed on good white paper, substantially bound in cloth, and a book you will want to keep for constant reference.

We want every one of our customers to have this book, and will give a cloth-bound copy free with every order for trees or plants of $5.00 or over. See full details in center pages of the enclosed bulletin.

Let us remind you again of the lower prices this year on genuine trade-marked J. H. Hale peach trees. The J. H. Hale is taking the country by storm. Never has there been a peach of such value

offered to fruit-growers. It commands a premium when other peaches hardly pay for picking, as was proved in Mr. Hale's orchards last summer. Get your order in now. If you have already planted it, you will want to extend your orchards of this great money-maker. Read the facts and the new reduced prices for 1916 in the Bulletin.

We also want to recommend Mr. Hale's new Early Rose peach, best of all early peaches—the wonderful new Endicott Plum—the Reading Giant Asparagus—and especially the McDonald
174 Blackberry, a new creation the largest, earliest and heaviest yielder we know in blackberries. The McDonald, on commercial plantations, has yielded as high as 300 to 500 crates per acre. Try the McDonald in your section. It will doubtless prove your greatest money-maker in bush fruits.

We appreciate the orders which you have sent us in previous seasons, and look forward to filling your wants again this year. You will find a full assortment of everything in the enclosed Bulletin.

We need not tell you that you will get nothing but the strongest-rooted, highest quality stock grown when you buy from William P. Stark. That is why our old friends and customers come back to us year after year. We want to count you among them again this spring. Enclosed is return envelope and order blank for your convenience.

Yours very truly,

WILLIAM P. STARK.

Tear Off—This Coupon Must Be Attached To Your Order.

William P. Stark Nurseries, B2

Stark City, Missouri, ...1916.

GENTLEMEN:

Enclosed find $— covering my order attached. (Order must be for $5.00 or over.) Please send me a free copy of the new Cloth-Bound Book, "Inside Facts of Profitable Fruit-Growing," all charges prepaid.

Name.....

Address.....

.....

(NOTE:)—If you are not planting this season, get a friend or neighbor to make up and send in an order for $5.00 or over, and we'll send each of you one of these Cloth-Bound Books Free. (Fill out this coupon and have your friend pin it to his order.)

EXHIBIT "5."

William P. Stark Nurseries.

Orchard Experts and General Nurserymen.

Stark City, Missouri, U. S. A.

William P. Stark, Trees direct at 50% of agents' prices.

Nurseries at Stark City, Mo.
We employ no agents but sell direct to you.
General Offices & Packing Houses at Neosho, Mo.

Stark City, Missouri,
January 12, 1916.

J. R. Elder, Sioux City, Iowa.
(Written across this part in ink:

"Yours in confidence.
(Signed) Cannot read initials).

175 DEAR SIR:

We have heard of a man in your vicinity who claims to be our agent or salesman. He is a fake.

We have no agents in any part of the country.

Every dollar's worth of our business is done directly with the orchardist. This means so much to you that we want to write you a letter telling you how we came to establish the biggest nursery business in the world selling by mail direct to the consumer.

In the first place, we control important special varieties of trees. For instance, the J. H. Hale Peach Tree is a licensed variety and is without question the sensation of all time in the nursery world.

This tree, of course, has imitators. Many of them are endeavoring to convince inquirers that they have the original J. H. Hale trees from the William P. Stark Nurseries of Stark City, Missouri. For your guidance, let us say that the real J. H. Hale trees have Mr. Hale's personal signature on the tag and the only place these come from is the William P. Stark Nurseries of Stark City, Missouri.

We find that in order to carry on a highly scientific nursery business, it is necessary for us to be able to guarantee many things to the individual buyer utterly impossible under the old agent system. If every agent were an experienced tree man, an experienced nurseryman, a man of thorough-going responsibility—in other words, a high-class business man—there might be no trouble with the agent system.

But we found that agents make it almost impossible for trees to reach the grower in perfect condition. Hence, many concerns of the very best intentions, growing good stock, are absolutely handicapped because their product is marketed through agents and canvassers. As a consequence, we do not condemn other products and

other concerns of much as we do this agent system of selling which lends itself to all kinds of impositions on the buyers.

In the first place, the agent system costs too much. It costs from 40% to 50% commission. But the consumer pays it. It is not worth that much to solicit an order and deliver the trees. In other words, the agent does not give a service that entitled him to 50% commission.

The trees might leave the nursery in first class condition. On the other hand, they might reach the consumer badly damaged. Trees, if unpacked and left standing about in warm temperature, or drafty barns, or in dry places, lose their vitality and vigor. It takes them from a year to two years longer to come into bearing. That loss is a serious and costly one to the fruit-grower.

A careless agent has been known to mix up tags so that a customer buying one variety might receive a radically different variety, through no fault of the nursery, but because the agent carelessly replaced the tags that might have become loose, since he was not expert enough to know the actual varieties.

Therefore, we found that the principal menace in the nur-
176 sery business is the system by which the great bulk of nursery goods is sold.

We had to develop our own method of selling. First, we knew that packing was absolutely necessary in order that trees properly grown should reach the consumer in proper condition. We knew that trees must not be unpacked from the time they leave the nursery until the buyer gets them. They should not be unpacked. They should not be handled. Their condition should not be interfered with. Their tags must not be tampered with. We knew the only way we could deliver the trees in the right condition, properly tagged, as good as the day they left our soil, was to send them direct from our packing house to the buyer. Sending direct meant selling direct.

We further knew that with the care we took in propagating, in training and in handling trees that an agent's commission could not be added to our cost and the product be delivered to the consumer at a price he could afford to pay. In other words, we had to reduce selling cost to the minimum in order to deliver our product to the consumer at the bargain price we desire to give. Hence, our mail-order method of selling.

We know that fruit-growers ought to have the guide and counsel of the best talent they can get. With an agent plan we knew we could not be in direct contact with our customers, but that we would be represented by someone who might not tell our story to the consumer as we would like to have it told. We knew that agents could not give the guidance and counsel that the orchardist ought to have. So we determined in order to be in direct contact, either personally or by mail, with our thousands of friends throughout the country, that we would undertake the most thorough-going correspondence system ever devised in this business—the answer was, of course, a mail-order selling system.

We know many people might get trees badly handled by the rail-

roads through no fault of the nursery. If an agent handled the case and we had paid the agent 40%, we could not be as liberal in adjustment and in replacing goods as we want to be and as we ought to be. So in order that we might get direct from the consumer an expression of satisfaction, or dissatisfaction, we undertook the correspondence which means an exchange of comments and letters with every customer and prospective customer on our books.

You will see, therefore, that the William P. Stark system of selling by correspondence entirely from catalogue, is the most important development in the history of the nursery business. It directly concerns every man and woman in America contemplating the purchase and the growing of trees.

We do give better, stronger, healthier trees, honest variety, double guaranteed, true-to-name, Stark City grown roots, freedom from disease.

We do *not* ship direct to you in a 3,000 mile package which guarantees safe arrival always.

177 We do give you the personal counsel of Mr. William P. Stark and Mr. W. H. Stark—the foremost men in this business in America. You are at liberty to correspond directly with these men at all times.

So we believe this shows you why you should buy your trees direct from Stark City and from nowhere else. We hand you herewith order blank which assures that your order will have the supervision of an official of this company. You will have the best trees that the best soil in American can grow. And you will get them in perfect condition. Send your order now. It will give us time to check it over, make the selection and have everything ready to ship at the most favorable planting time for your section. It is always the wisest plan to order as early as possible, and it is to your advantage to do so.

Write us as fully as you wish about your problems and plans. We are interested in your success and are here to help you in every way we can. Won't you please get the letter off tonight? We are waiting to hear from you. You can write your reply on the back of this sheet if you wish.

Very truly yours,

WILLIAM P. STARK.

P. S. We are getting out a new book, "Inside facts of Profitable Fruit Growing," covering the planting, care and cultivation of fruit trees, small fruits, shrubbery, etc., preparation of ground, dynamiting, pruning, spraying, cover crops, etc., with actual methods followed by the most successful fruit-growers in different parts of the country—many methods not generally known and which have made thousands of dollars for growers who follow them. This book will be off the press within a few days. When you send in your order be sure to mention this book, and we will be pleased to send you a copy without charge. You will find it of exceptional interest and great help in your orchard work.

WPS

W. P. S.

A/2

EXHIBIT "9."

"To Avoid Delay Always Address Correspondence Plainly to The William Stark Nursery Co., Louisiana, Missouri. We have No Connection with Any Firm or Company of Like Sounding Name.

William Stark Nursery Company.

William P. Stark.

William H. Stark.

Earl M. Wilson.

We employ no Salesmen, Agents, Dealers or Canvassers.

Stark Trees—direct from Nursery to Orchard at half of Agents' Prices.

178 *Growers of Good Fruit Trees.*

Louisiana, Missouri.
North Manitou Island, Michigan,
August 28, 1912.

Stamped in upper left-hand corner:

"Office of
Asst. Attorney General
Received
Sep. 3, 1912,
Post Office Department."

Above letter-head being cut off below the date-line).

EXHIBIT "11."

C. I. Lewis,
Professor of General Horticulture and Pomology.

C. A. Cole,
Assistant Professor of Pomology.

Department of Horticulture
Oregon Agricultural College
and
Experiment Station

C. C. Vincent,
Research Assistant

R. W. Allen,
Sup. of Experiment Farm, Hermiston, Oregon.

Arthur L. Peck,
Assistant Professor of Landscape Gardening and Floriculture.

Arthur G. Bouquet,
Instructor in Market Gardening.

E. J. Kraus,
Research Assistant

J. A. Gilkey, Gardener.

Claude Sprague,
Foreman of Orchards.

Corvallis, Oregon, June 30, 1910.

Stark Bros. Nurseries & Orchard Co.,
Louisiana, Missouri.

GENTLEMEN:

In reply to your recent letter concerning fall planting I will state that for Western Oregon, including the Williamette Valley, Umpqua Valley and the Coast Counties, also Rogue River Valley in Southern Oregon, I would by all means recommend fall planting. For the higher altitudes of the state and for those regions that are subject to low temperature in winter I would recommend spring planting. The severe frosts that we have had the past two years have been along the lines of very premature fall frosts, followed by colder winter temperatures than is customary.

We have been experiencing in Western Oregon considerable winter killing, whereas under normal conditions we suffer very little from such causes. From our experience during the last two years, I would urge the growers of Western Oregon, and Southern Oregon
179 west of the Cascades, to plant in the fall, or at least not later than February. I have noticed that we have had less winter killing from fall planting than from spring planting and that the trees take hold much better when planted in the fall.

Trusting that this will be of assistance to you, I am,

Yours sincerely,
(Signed) C. I. LEWIS."

(In lead pencil: "Professor of Gen'l Hort. & Pomology")
Filed in the District Court of the United States Apr. 29, 1918.

(*Order as to Record*)

It appearing to the court that the parties to the above entitled suit desire certain portions of the record on appeal to be reproduced in the exact language of the witness.

It is thereupon ordered that such portions of the record filed with the clerk be reproduced in the exact words of the witness.

ARBA S. VAN VALKENBURGH,
District Judge.

Filed in the District Court of the United States May 4, 1918.

(*Election as to Printing.*)

The defendants in the above entitled cause hereby elect to have the transcript to the United States Circuit Court of Appeals, printed under the supervision of the clerk of the District Court of the United States for the Western District of Missouri.

PEARSON & PEARSON,
WILFLEY, McINTYRE, NARDIN & NELSON,
Attorneys for Defendants.

Filed in the District Court of the United States May 4, 1918.

(*Order Extending Time to File Transcript.*)

For good cause shown the time within which to lodge transcript in the above entitled cause in United States Circuit Court of Appeals is hereby extended thirty days from May 25, 1918.

ARBA S. VAN VALKENBURGH,
District Judge.

Filed in the District Court of the United States May 20, 1918.

(*Memorandum on Plaintiff's Motion to Strike.*)

It appears, from a careful reading of the pleadings and consideration of the arguments and briefs of counsel, that the court can pass more justly and satisfactorily upon the questions of trade-mark and infringement, and the relationship of the charge of unfair trade thereto, at the end of a fuller hearing upon the merits. The motion to strike is, therefore, overruled, as well as all objections to
180 the sufficiency of the bill which were discussed in connection therewith. The parties will proceed to the proofs upon the issues tendered. It is so ordered.

Kansas City, Missouri, January 5, 1917.

ARBA S. VAN VALKENBURGH,
Judge.

Filed in the District Court of the United States, Jan. 6, 1917.

(Memorandum on Final Hearing.)

The complainant is a nursery corporation of long standing, located at Louisiana, Missouri. It and its predecessors have been engaged in this business for approximately a century. It and its products have been widely known for many years and enjoy a national reputation. About thirty-five years ago it adopted the words "Stark Trees" as its trade-mark, and all its shipments have long been marked by a label in which the word "Stark" is superimposed upon the word "Trees" in striking and characteristic arrangement. June 24, 1913, this mark was duly registered under the ten-year clause of the Act of 1905.

Defendant, William P. Stark, is one of the Stark Brothers, and was for many years and still is a stockholder in the plaintiff corporation; and the defendant, William H. Stark, son of William P. Stark, was formerly in the employ of the plaintiff, severing his connection therewith in April, 1912. Shortly thereafter, defendants formed the William Stark Nurseries, operated at first at Louisiana, Missouri, and later under the present name, and at present, at Neosho, Missouri. Defendants adopted a label, exploited in their catalogues and also attached to nursery and orchard stock shipped to purchasers, containing the following words:

"Nursery to Orchard
William P. Stark Nurseries
Fruit Trees
Stark City, Missouri."

On this label the word "Stark" appears prominently in white letters upon the dark background of a fruit tree; the balance of the label being printed in black letters. In this manner the word "Stark" is given special emphasis, and from its position the term "Stark Trees" is vividly suggested. Complainant brings its bill to enjoin this alleged infringement of its trade-mark and prays an injunction, damages and accounting for profits therefor, and also for unfairness in trade incidental thereto. Inasmuch as both plaintiff and defendants are citizens and residents of this state the charge of unfair trade can be sustained, if at all, only through the jurisdiction acquired by reason of the technical trade-mark involved.

That the plaintiff's trade-mark is a valid and subsisting one under the Act of 1905, admits of no debate. Complainant had the right to register it, and, having registered it, is entitled to its protection as a valid trade-mark under the statute.

181 (Thaddeus Davids Co. v. Davids Mfg. Co., 233 U. S. 461.
Rossman v. Garnier (C. C. A.), 211 Fed. 403.
Manitou Springs Mineral Waters Co. v. Schueler, et al. (C. C. A.), 239 Fed. 593-602.)

Nor is that protection limited to its use when standing alone and the precise manner in which complainant has used it on its label. As said by Mr. Justice Hughes in Davids v. Davids, supra:

"The statutory right cannot be so narrowly limited. Not only exact reproduction, but a 'colorable imitation' is within the statute; otherwise, the trade-mark would be of little avail as by shrewd simulation it could be appropriated with impunity."

It is equally apparent that the defendant's device falls within this prohibited category and constitutes a palpable infringement. The substitution of the drawing of a tree for the written word is so obvious in the connection in which the marks are used as to afford little room for hesitation; nor does writing "William P." before the surname "Stark" legitimize the unwarranted appropriation any more than the initials "C. I." before the word "Davids" were effectual in the case before the Supreme Court. There the name "Davids," as a label for ink, was the important word which had acquired a secondary meaning subsequently ripened into the technical trade-mark. Here the name "Stark" in connection with fruit trees is the term which stamps the origin and ownership of the product. The case at bar differs radically from that of Pittsburg Crushed-Steel Co. v. Diamond Steel Co. (C. C.), 85 Fed. 637, and same case under title Kahn v. Diamond Steel Co. (C. C. A.), 89 Fed. 706, both as to the similarity of the respective marks, the circumstances of their respective use, and the element of confusion which, by this record, is shown to have been created.

It is urged by defendants that the purchasers from complainant and defendants alike do not buy upon the faith of this trade-mark, and do not see it, if at all, until the trees have been shipped and reach their destination; that then the mark is attached to the box or package containing the trees and not to the trees themselves. This defense is unsound. Given a valid trade-mark, its use by another than the owner cannot be excused upon the ground that the purchaser in any case did not happen to see it and rely upon it prior to the initial act of purchase. He has the right to verify the desired origin of his goods by examination upon receipt. Complainant affixes its mark to its goods, or to the packages containing the same, as it said it would do in its statement to the patent office upon which that mark was registered, and it is a like use by any other than the owner that the law of trade-marks prohibits, irrespective of who may or may not make ocular examination thereof. In Moet v. Pickering, 6th Ch. Div. 770, Justice Sir Edward Fry sustained a charge of infringement and granted an accounting where the mark was branded on the cork of a champagne bottle, and could not be seen until
182 the cork was drawn. There the same contention was made and at first challenged the attention of the justice, who said:

"How can a brand which is not visible till the cork is drawn be the subject of protection as a trade-mark? The spurious brand cannot be the means of inducing anyone to purchase the defendant's wine, as the purchaser would not see it until after he had made the purchase."

Nevertheless, upon mature consideration, he had no difficulty in sustaining the mark and granting the relief prayed. Since this con-

troversy arose, defendants have discontinued the exploitation of the mark in their catalogues and claim to have abandoned the use of the label in shipments. There is some evidence, however, that the shipping label has been employed since the period of such claimed abandonment.

There can be no doubt that the defendants for some time prior to the dates on which they severed their active connection with the complainant company were exploiting their individual names and personalities through the literature of the complainant corporation and otherwise, and were engaging in other activities with a view to setting up a competitive business and of appropriating a portion of the prestige which had been acquired and which was being enjoyed by complainant. Since the establishment of defendants' business its literature has pointedly aimed at such appropriation of the high reputation of the Stark name in connection with nursery products in Missouri; a reputation acquired by and identified with the complainant in this case. This statement, as well as the ruling of the court upon the issue of technical trade-mark, is supported and confirmed by the language of defendants themselves taken from their catalogues and advertising matter:

"The name of 'Stark' has for nearly a century been associated with the nursery business of America, and for the last quarter of a century William P. Stark has made the same a sort of a trade-mark for big things in the nursery world. Now, with William P. Stark's great name and life-long experience to direct affairs, and William H. to assist, the William P. Stark Nurseries are in a better position than ever to continue and broaden the Stark Nursery business in Missouri at their Stark City plant."

This statement was published while the nurseries of the defendants were newly established and comparatively in their infancy.

Again,

"Four generations of William Stark nurserymen. The commission men of South Water street looked sideways when William P. Stark commenced over ten years ago to tell us of Delicious, Stayman Winesap, Black Ben, Liveland Raspberry and others.

"William P. Stark certainly knows what varieties for the commercial grower to plant and what not to plant. Of course, the Starks have been doing just this sort of thing for ninety years or more, so it is no new thing to have the trade come around and back up Stark's judgment, as they have in the case of Delicious, Stayman and others.

183 "William P. Stark is a real nurseryman and fruit grower. He doesn't pretend to be anything else. Of the four generations of William Starks three are living today, and there was still another generation of Starks before the first William Stark engaged in horticultural work."

For a number of years prior to the inception of defendants' enterprise the Delicious apple had become widely known as a fruit of very superior excellence. It had practically been discovered and the con-

trol of its propagation had been secured by the complainant company, by which it had been placed before the public and under whose auspices its high reputation was builded and established. So close is the relationship between this fruit and its producer that this apple is rarely, if ever, spoken of other than as "Stark's Delicious." Defendants in their literature, after dealing with the origin of this fruit in an Iowa tree, in connection with which no credit is given to complainant, say:

"Two or three years after this two barrels were shipped to William P. Stark, who was ever on the lookout for something meritorious, and immediately recognizing their superiority, commenced negotiations for their propagation. Only for William P. Stark the Delicious apple might never have been known. It was William P. Stark who came to the rescue, saved the apple and gave it to the pomological world."

"William P. Stark was the first to recognize the merits of this great apple. He named it 'The Delicious' and had the foresight and courage to propagate it and to urge growers to plant it."

While it may not now be true that any single nurseryman may claim the exclusive privilege of propagating and exploiting this apple upon the market, nevertheless, read in connection with the known history thereof, the language quoted is obviously intended and calculated to confuse the public respecting the identity of these rival nurseries.

William P. Stark claims to have been the representative of complainant, through whom this fruit was originally acquired. This is denied by complainant. He further claims to have named the fruit because of its flavor and the impression made upon him when he first tasted it. It is undoubtedly true that at that time this defendant was one of the active members and an officer of the complainant corporation. His position is that he is a Stark, and that he was actively engaged in the operations which built the reputation of the Stark name in the nursery business. Conceding all this to be true, nevertheless it cannot be denied that whatever he may have accomplished in this regard was as a representative of the complainant corporation, in its name, and for its benefit, as one of others of that family and corporation similarly engaged. He cannot now draw to himself individual credit therefor to the extent of invading the property rights of complainant and of substituting himself for complainant to the confusion of the public. He may not be denied the legitimate use of his name in business. He should observe the tests laid down by Judge Amidon in Stix, Baer & Fuller Dry Goods Co., et al. v. American Piano Company (C. C. A.), 211 Fed. 271:

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1. "He may not affirmatively do anything to cause the public to believe that his article is made by the first manufacturer.

2. "He must exercise reasonable care to prevent the public from so believing.

3. "He must exercise reasonable care to prevent the public from believing that he is the successor in business of the first manufacturer."

The defendants' warnings to the public, to-wit:

"We have heard of a man in your community who claims to be our agent. He is a fake.

"Look out for agents claiming to represent us. They are frauds.

"No connection with any other concern.

"The William P. Stark Nurseries is not connected or related in any way with any other nursery with similar name,"

so far from absolving defendants from the charge of unwarranted encroachment, in point of fact, under the circumstances revealed by this record, really invite the public to regard the defendants as the original Starks, and all others of similar name as interlopers in the nursery business in Missouri.

As further evidencing the efforts of defendants to avail themselves of the established reputation of the Stark name in the nursery world, it should be noted that, for some years prior to the establishment of the William P. Stark Nurseries, the complainant company had widely featured in its advertisements the addresses "Stark, Missouri," "Starkdale, Missouri," and "Stark Station, Missouri." The defendants, after leaving Louisiana located their offices at a small town named Chester. Thereafter, the name of this town was changed to Stark City, and within a short time defendants moved their offices to Neosho, Missouri, where they are now located, and where their packing house is maintained. Stark City has been practically, if not entirely, abandoned, and yet, upon the infringing label the address "Stark City, Missouri" appears.

It is urged by counsel for defendants that complainant never maintained an office at Stark or Starkdale, Missouri, and that neither these names nor that of Stark Station have any concrete connection with complainant's business; that, however, is not the point involved in this controversy. Those names were used in advertising to distinguish and localize complainant's business. The adoption of so similar a name as Stark City by defendants was obviously intended to introduce another element of confusion in the public mind. Counsel say in their brief:

"This name was changed by the postoffice department upon the petition of the citizens of Chester, which was a little town on a new railroad that had been in existence only a short time."

It is true that a petition of citizens was lodged with the postoffice department, but it was transmited for that purpose by the
185 defendant, William H. Stark. The testimony of the defendants with respect to this incident was most unsatisfactory, and it was apparent to the court that the change of name was brought about at their instance and for the purpose charged in the bill.

The court has no doubt that the defendant, William P. Stark, is a nurseryman of experience and ability. It has no disposition to deny

to him the proper use of his name in his business, but he should use it with such limitations as the circumstances and conditions presented by this record demand. The decision of the Supreme Court in the Davids case seems peculiarly applicable here. On this point the opinion says:

"It is not necessary that, in exercising the right to use their own name in trade, they should imitate the mark which the complainant used, and was entitled to use under the statute, as a designation of its wares; or that they should use the name in question upon their labels without unmistakably differentiating their goods from those which the complainant manufactured and sold."

The complainant's trade-mark having been found valid, this court has jurisdiction of the parties, and of the subject matter, for the purpose of enjoining not only the infringing of that trade-mark, but also all wrongful acts in the nature of unfair trade done in connection with the infringement which augment and aggravate the wrong. (Jacoway v. Young (C. C. A.), 228 Fed. 630). The defendants will be enjoined from the use of the infringing label charged or any colorable imitation of complainant's trade-mark in suit, from using the name "Stark City" upon its labels or tags attached to nursery stock or packages containing the same, and from putting the word "Stark" prominently at the top of its labels, or elsewhere in connection with the business of producing and selling nursery stock in such manner as will not unmistakably differentiate their goods from those which the complainant produces and sells.

Defendants will be required to account to complainant for damages sustained and for profits accruing during the period within which complainant's trade-mark is shown to have been infringed. A decree may be prepared accordingly.

Kansas City, Missouri, January 30th, 1918.

ARBA S. VAN VALKENBURGH,
Judge.

Filed in the District Court of the United States Jan. 30, 1918.

(*Supplemental Memorandum on Settlement of Decree.*)

Defendants except to the draft of decree tendered by counsel for complainant, and upon further hearing granted, the following grounds of objection were stated:

1. That complainant is not entitled to an accounting; (*a*) because of laches in bringing its action, involving a failure to complain of the unwarranted use of the trade-mark in suit; and (*b*) that immediately or within a reasonable time after notice served on Au-
186 gust 26, 1916, defendants discontinued the use of their objectionable label.

2. That under the terms of Section 28 of the Act of February 20, 1905, as amended, neither accounting nor damages would lie for any period anterior to August 26, 1916, and that under the facts de-

veloped in the record such would be nominal merely and would not justify the expense of an accounting.

3. That the draft presented was objectionably prolix in its recital of facts and argument.

4. That defendants should not be either restrained or restricted with respect to the use of the Stark City address.

That the draft tendered was somewhat prolix in recital is conceded, and some portions have been omitted in the decree prepared by the court.

The doctrine announced in McLean v. Fleming, 96 U. S. 245 and Menendez v. Holt, 128 U. S. 574, is well established and has been restated in many federal decisions. Briefly stated, it is:

"Unreasonable delay in bringing a suit is always a serious objection to relief in equity; but cases arise in litigations of the kind before the court where the complainant may be entitled to an injunction to restrain the future use of a trade-mark, even when it becomes the duty of the court to deny the prayer of the bill of complaint for an account of past gains and profits."

The reason for the rule is well stated by the Supreme Court in a number of cases. Thus in Townsend v. Vanderwerker, 160 U. S. 171:

"The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

And still more fully in Galliher v. Cadwell, 145 U. S. 368:

"The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them. * * *

"They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity
187 founded upon some change in the condition or relations of the property or parties."

It will be noted, therefore, that each case presented depends upon its own peculiar facts, and that mere delay in asserting legal rights is not a bar; there must have been such change in condition or rela-

tions, such reasonable ground to rely upon waiver or abandonment, in short, the intervention of some element in the case which would cause the delayed assertion of those rights, to work injustice. A number of cases are cited in which after a delay of six or more years the injunction was granted but accounting denied. None of these cases are, of course, persuasive against the granting of the injunction prayed, nor are they at all determinative of the right to an accounting. The case of Rubber, etc. Co. v. Devoe, et al., 233 Fed. 150-160 is a case not of trade-mark but of unfair trade. In it damages were awarded; the accounting for profits was denied because the court could not find that the unfair competition was so wilful and fraudulent as to justify the imposition of profits. This is the extent of the application, if any, of the opinion in Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251. In Rossman v. Garnier (C. C. A.), 211 Fed. 401, it did not appear that "in the use of the trade-mark the appellee ever complied with the requirement that she give notice to the public by affixing thereto the words "Registered in U. S. Patent Office," or "Reg. U. S. Pat. Off.," nor on a separate label, nor is there any evidence that any notice was ever given appellee of the infringement.

"It follows that no damages can be recovered and no use would be subserved by an accounting."

In this case it must be kept in mind that it has been adjudged that the defendants with full knowledge of complainant's rights, the history of its business, the marks employed by it, and the fact that the name "Stark" had become practically a trade-mark in nursery matters, nevertheless deliberately and premeditatedly sought to draw to themselves the benefit and advantage of complainant's prestige and repute. Such a situation differs radically from one in which an infringement, although found to exist, is unaccompanied by a conscious and wilful purpose. In the latter case the demand for notice and warning is recognized as an appropriate and equitable condition to the right to exact what Judge Haight has characterized as a "punitive addition to the ordinary decree of compensatory damages."

But in the record before us which, at the earnest solicitation of counsel, I have again examined more in detail upon this point, it abundantly appears that defendants not only were consciously encroaching upon complainant's rights, as I have said, but also that complainant resented and seriously objected thereto. It may be true that prior to August 26, 1916, a formal and technical notice had not been served which dealt with this trade-mark in specific terms, but litigation started between these parties as early as 1913, extending to the fall of 1914. Suits were instituted, the issues in which did not directly involve this trade-mark, and the settlement reached
188 concerned only those issues and constituted in no sense a waiver of the rights asserted. Confusion of mail, growing out of the Stark City address, was referred to the Postmaster General, through the Attorney General for that department, and an award was made, in some measure in favor of complainant. The use of the

Stark name runs through all the differences disclosed as the gist of the controversy. On or about March 11, 1914, the president of complainant wrote to the defendant, William P. Stark that

"We would have to take drastic action if his unfair methods and misleading statements did not cease."

"We hereby notify you to discontinue their unfair competition and infringement on our rights."

Again, January 15, 1916, a letter of the same general purport was written by complainant to defendants' known attorneys. Early in 1916 the matter was taken up with the Federal Trade Commission. Formal notice was again sent in August, 1916, and Mr. E. W. Stark testifies that he wrote other letters and made other demands intermediately to the same effect. I cannot escape the conclusion that, throughout this period, complainant was reiterating its objection to the action of defendants, and that defendants were well aware of the substance of its complaint. Such being the case, I find no such waiver, abandonment or laches as would preclude complainant from substantial recovery, if the same can be made to appear upon accounting. I think, in any view, the accounting for profits should begin with March 11, 1914, and it will be so ordered.

With respect to the question of damages, as distinguished from an accounting for gains and profits, the situation is somewhat different in my mind because of the statute to which reference has been made and the action of complainant thereunder. Section 28 requires certain specific forms of notice to be given, and provides that,

"In any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement and continued the same after such notice."

Pursuant to these requirements, complainant, through its counsel, sent the formal notice of August 26, 1916, and I think a reasonable and conservative construction of the situation thus presented should limit the complainant to damages, as distinguished from profits, to the period beginning with the date of this formal notice, to-wit, August 26, 1916.

Finding, as I do, that the address of Stark City was procured and adopted for the purposes stated in my original memorandum, and that this address was used in connection with the trade-mark infringement, as well as elsewhere in the literature and advertising matter of defendants; further that there has been adduced to the court evidence that it is still being employed for the purpose of appropriating to the product of defendants that advantage of origin peculiar to the Stark name, which has been found to be a property right of
189 complainant, I feel that complete justice cannot be done, and efficacy accorded to the relief prayed and granted, without denying to defendants the right to use that address in advertising their business and wares. It is in no sense essential to the legitimate conduct of defendants' business if that is restricted, as it should be, to its own inherent merits and to the personal reputation of the defendant, William P. Stark as distinguished from that of the com-

plainant. The term "Stark City Trees" suggests "Stark Trees," and has no special significance apart from that suggestion. As this address came into being for a specific purpose, it should no longer be indulged when that purpose is found to involve unfairness in trade.

As I have said, this address was used in connection with and upon the infringing labels. The injunction goes to a broader use. While jurisdiction was acquired by reason of the technical trade-mark involved, nevertheless, having taken cognizance of the case upon any ground on which jurisdiction is given, I conceive that the court may, to this extent at least, proceed to dispose of the whole controversy between the parties. In no other way is it perceived that substance and effect may be given to the rule that, in such cases, the court has jurisdiction for the purpose of enjoining not only the infringement of the trade-mark, "but also all wrongful acts done in connection with the infringement which augment and aggravate the wrong" (Jacoway v. Young (C. C. A.), 228 Fed. 630).

Kansas City, Missouri, February 26th, 1918.

ARBA S. VAN VALKENBURGH,
Judge.

Filed in the District Court of the United States Feb. 26, 1918.

UNITED STATES OF AMERICA, *ss:*

I, John B. Warner, Clerk of the District Court of the United States for the Southwestern Division of the Western District of Missouri, do hereby certify that the above and foregoing is a true, full and complete copy of the record, statement of evidence, assignment of errors, and all proceedings in the cause wherein Stark Bros. Nurseries & Orchards Company is plaintiff and William P. Stark and William H. Stark, Trustees, doing business under name and style of William P. Stark Nurseries, are defendants, as fully as the same appears on file and of record in my office, in compliance with praecipe filed herein and made a part hereof.

I further certify that the original citation is prefixed hereto and returned herewith.

Witness my hand as clerk and the seal of said court.

Done at office in Joplin, Missouri, this 27th day of May, A. D. 1918.

[SEAL.]

JOHN B. WARNER,
Clerk U. S. District Court,
By C. J. MURRAY, *D. C.*

U. S. Dist. Court S. W. Div. of West Dist. of Missouri.

190 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(*Appearance of Counsel for Appellants.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5181.

WILLIAM P. STARK et al., etc., Appellants,

vs.

STARK BROS. NURSERIES & ORCHARDS COMPANY.

The Clerk will enter my appearance as Counsel for the Appellants.

O. L. CRAVENS,
XENOPHON P. WILFLEY,
EUGENE PEARSON,
RAS PEARSON,
WILFLEY, McINTYRE, NARDIN & NELSON.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 11, 1918.

(*Appearance of Mr. J. W. Matson as Counsel for Appellee.*)

The Clerk will enter my appearance as Counsel for the Appellee.

J. W. MATSON,
Louisiana, Mo.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 7, 1918.

191 (*Appearance of Mr. Andrew B. Remick as Counsel for Appellee.*)

The Clerk will enter my appearance as Counsel for the Appellee.

ANDREW B. REMICK,
D 16 Railway Ex. Bldg., St. Louis.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 11, 1918.

(*Order of Argument.*)

December Term, 1918.

Tuesday, December 17, 1918.

This cause being this day called for hearing, argument was commenced by Mr. Xenophon P. Wilfley for appellants, continued by Mr. Andrew B. Remick for appellee and the hour for adjournment having arrived further argument was postponed until tomorrow.

(*Order of Submission.*)

December Term, 1918.

Wednesday, December 18, 1918.

This cause having been called for further hearing, argument was concluded by Mr. Eugene Pearson for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

192 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1918.

No. 5181.

WILLIAM P. STARK, et al., Appellants,

vs.

STARK BROTHERS NURSERIES & ORCHARDS CO., Appellee.

Appeal from the District Court of the United States for the Western District of Missouri.

The appellee instituted this action to enjoin the appellants from infringing its registered trade-mark and from unfair competition, with the usual prayer for damages and an accounting of profits.

The appellee is a corporation existing under the laws of the State of Missouri and the appellants, defendants in the court below, are citizens of the same State, the jurisdiction of the court having been invoked upon the sole ground of the registration of the trade-mark under the Act of Congress of February 20, 1905, and the amendments thereto.

The complaint charges that the plaintiff now is and has been since the year 1816, including its predecessors, James Stark, Wil-

liam Stark, Stark & Barnett, Stark & Company, and Stark Brothers Nurseries Company, engaged in the business of propagating, buying and selling fruit trees and other nursery stock, and ever since 1893 marked them with the words "Stark Trees" as its trade-mark, affixing it to boxes or packages containing its product; that it has incurred great expense in propagating trees and advertising them as "Stark Trees" and that this trade-mark has become widely known in this and many foreign countries, as indicating a superior grade of trees propagated and sold by the plaintiff and its successors; that its fruit trees are invariably bought and sold and commonly designated as "Stark Trees"; that on January 9, 1913, it filed in the United States Patent Office an application for registration of
193 its said trade-mark "Stark Trees" in accordance with the Act of Congress of February 20, 1905, and its amendments, and on June 24, 1913, it was duly registered in the United States Patent Office as registration No. 92,282; that it claims the exclusive right to the trade-mark "Stark Trees" or the word "Stark" on fruit and ornamental trees, and this has always been claimed by its predecessors, they being the first to adopt this mark for nursery stock; that in the spring of 1913 they found sales of fruit trees, labeled and marked with the words "William P. Stark Nurseries", said words being printed across the representation of a short, bushy tree, so arranged that the word "Stark" appeared in large, prominent letters, across the picture of the tree and the other words in comparatively smaller type, which, upon investigation it found was marked and sold by the defendants; that defendants well knew of the exclusive use claimed by plaintiff of the trade-mark "Stark Trees," or any simulation thereof, and that they used the trade-mark "Stark" in conjunction with the representation of a tree with the intent to defraud and deceive, and have caused their stock to be bought as and for the nursery stock of the plaintiff, much to plaintiff's loss and injury to the public, and the infringement of plaintiff's registered trade-mark, and of its trade-mark rights under the law; that defendants were duly notified of their infringement, but continued to do so since then; that William P. Stark, one of the defendants was for a number of years an employee, officer and stockholder of plaintiff; during which time he attempted to and did familiarize his personal name to readers of the plaintiff's general advertising; that defendants in 1912 established a nursery business, with the principal office at Louisiana, Missouri, the home of plaintiff and its predecessors, causing a confusion of mails, which ceased, when by order of the Postmaster General, all mail addressed to the name of "Stark" should be delivered to the plaintiff, whereupon the defendants moved their nurseries to Chester, Missouri, and caused the name of the town and postoffice of Chester to be changed to "Stark City", in face of the fact that for years prior thereto the plaintiff had extensively advertised its addresses at "Stark", "Starkdale", and "Stark Station", Missouri. That all the offices of the defendants are at Neosho, Missouri, about ten miles from Stark City, while all their advertising prominently bears the address "Stark City",

causing much annoyance and confusion to the plaintiff; that
194 defendants in their extensive advertising dwelt upon the fact that the name of "Stark" had for nearly a century been associated with the nursery business of America, and that for the last last quarter of a century the defendant, William P. Stark, has made the name a sort of a trade-mark in big things in nursery work, and that their nursery at Stark City would continue to broaden the "Stark" nursery business. That the business of plaintiff and its reputation and the name of "Stark Trees" had been built up at great labor and expense, employing five thousand salesmen.

The defendants in their answer deny most of the material allegations, and state that the first notification of the claim of the plaintiff to the trade-mark was in a letter received from it dated August 26, 1916, many years after they had used the name "Stark" in connection with their business, and deny that they had any knowledge of appellee's claim to the exclusive right to the use of the trade-mark "Stark Trees" until notified by that letter; they deny any intent to defraud or that appellee has suffered any loss by reason of their acts; they deny that the exclusive right to the trade-mark "Stark Trees" of the word "Stark" on fruit and ornamental trees has been and is now claimed by plaintiff and its predecessors, or that plaintiff was the first to adopt and use this trade-mark for nursery stock, and if it did, they had no knowledge of it until they received the letter of August 26, 1916. They deny that at the time the name of Chester was changed to Stark City plaintiff was using the address "Stark", "Starkdale", or "Stark Station", Missouri, that for years prior thereto it had not used any of these names nor had there ever been a postoffice named "Stark", "Starkdale", or "Stark Station", Missouri. They admit that they had advertised the location of their nurseries at Stark City, where they are in fact located, and their offices at Neosho, Missouri, and that the defendant William P. Stark had for over a quarter of a century been associated with plaintiff's nursery work. They claim that there can be no confusion, as all their sales are made by catalogues and advertisements and none by traveling salesmen, while the plaintiff did most, if not all of its business through traveling salesmen, and emphasized in its advertisements that it was located in Louisiana, Missouri, while defend-
ants in all their advertisements and catalogues emphasized
195 the location of their nurseries at Stark City; that in all their advertisements, letters and catalogues they had taken precautions to refrain from disparaging the plaintiff or its products, and that their competition had been fair and open.

Upon final hearing there was a decree in favor of the plaintiff enjoining defendants from the direct or indirect use of the infringing label, or any colorable imitation of plaintiff's trade-mark, in suit; and from putting the word "Stark" prominently at the top of its label, or elsewhere in connection with the business of producing, advertising and selling nursery stock in such manner as will not unmistakably differentiate their goods from those of the complainant; and from using the name or address of "Stark City" upon their labels, or tags attached to nursery stock, or packages containing

same, or from using the address "Stark City" in advertising their business. The decree also directed a reference to a special master to determine all gains and profits which the defendants have derived by infringing on plaintiff's trade-mark, beginning with the 11th day of March, 1914, and that the plaintiff also recover from the defendants all damages which it has sustained by reason of the defendants' infringement and unfair competition from and after the 26th day of August, 1916, on which date plaintiff gave notice to defendant of the registration of its said trade-mark. 248 Fed. 154. To reverse this decree, appellants are prosecuting this appeal.

Mr. Xenophon P. Wilfley and Mr. Eugene Pearson (Mr. O. L. Cravens, Mr. Ras Pearson and Messrs. Wilfley, McIntyre, Nardin and Nelson were on the brief with them), for appellants.

Mr. Andrew B. Remick (Mr. John W. Matson was on the brief with him), for appellee.

Before Sanborn and Stone, Circuit Judges, and Trieber, District Judge.

TRIEBER, *District Judge*, after stating the facts, delivered the opinion of the court:

It is undisputed that the appellee and its predecessors have used the name "Stark" in their nursery business for a century
196 and that its products have an established reputation for quality. On June 24, 1913, it was granted a registration of the trade-mark "Stark Trees" under the ten year clause of Section 5 of the Trade-Mark Act of Congress of February 20, 1905, 33 Stat. 725, as amended by the Act of February 18, 1911, 36 Stat. 918, par. 9490, U. S. Comp. Stat. 1916. That trade-mark consisted of the two words "Stark Trees" as shown by this photographic copy.

The appellee's device, charged as the infringement, is on a narrow tag of wood, as shown by this photographic copy.

The word "Stark" is in white letters, across the dark bushy tree, the other words are in black on white ground.

It will be noticed that the word "Stark", across the bushy tree, is in larger letters than any of the other words, which are in smaller type.

We concur in the finding of the learned trial judge that "In this manner the word 'Stark' is given special emphasis and from its position the term 'Stark Trees' is vividly suggested."

To justify a finding of infringement of a trade-mark, it is not necessary that the similitude should be exact. It is sufficient, if, taking into account resemblance and conditions, the former are so marked that an ordinary purchaser is likely to be deceived thereby. McLean v. Fleming, 96 U. S. 245, 251; Layton Pure Food Co. v. Church & Dwight Company, 182 Fed. 24, 34, 104 C. C. A. 464, 474; McDonald & Morrison Mfg. Co. v. Mueller Mfg. Co., 183 Fed. 972, 974, 106 C. C. A. 312; Heileman Brewing Co. v. Independent Brewing Co., 191 Fed. 489, 494, 112 C. C. A.
197 133, 138; De Voe Snuff Co. v. Wolff, 206 Fed. 420, 423, 124 C. C. A. 302, 305; O. & W. Thum Co. v. Dickinson, 245 Fed. 609, 614, 158 C. C. A. 37, 42. In Thaddeus Davids Co. v. Davids, 233 U. S. 461, 469, it was claimed that "the protection is limited to its use when standing alone and that there can be no infringement unless it is used in this precise manner." The court in denying this contention said, "The statutory right cannot be so narrowly limited. Not only exact reproduction, but a 'colorable imitation' is within the statute; otherwise, the trade-mark would be of little avail as by shrewd simulation it could be appropriated with impunity." In McDonald & Morrison Mfg. Co. v. Mueller, supra, this court held: "The test is not whether, when goods are placed side by side, a difference can be recognized in the labels or marks; but the test is, when such goods are not placed side by side, would an ordinarily prudent purchaser be liable to purchase the one, believing that he was purchasing the other." See also Gordon's Dry Gin Company v. Eddy & Fisher Co., 246 Fed. 954.

There can be no doubt that an ordinarily prudent person, knowing of the reputation of the Stark Trees, which for many years have been known as superior trees, would easily be induced to purchase the trees of appellants, in view of the advertisements, the statements in their catalogues and their trade-mark, in the belief that they came from the orchard nurseries of appellee. The catalogues and advertisements of appellants, which do not appear in the printed record, but were by order of the trial court, transmitted to this court, as a part of the record and have been carefully examined, indiscriminately describe their trees and nurseries as "Stark Nurseries," "Stark Brothers," "Stark Trees" and use the word "Stark" in connection with their nurseries and alleged location. The representation that the business is located at "Stark City", although they admit that only their nurseries are at Stark City, while the business itself is conducted at Neosho; the change of the name of the place where their nurseries are located from Chester to Stark City, the attempt to establish offices, at first, at Louisiana, Mo., all tend to impress one that there was an intention to add to the confusion and mislead purchasers of trees into the belief that their trees are those of appellee.

198 Nor does it matter that appellants were using their own surnames as their trade-mark. While it is true that a person

has a right to use his surname as a mark, without being guilty of an infringement, there is a limitation to that right. As stated in the Davids case, "provided that the name was not used in a manner tending to mislead and it was clearly made to appear that the goods were his own and not those of the registrant." The decree complained of only enjoined appellants from using labels with their name "Stark" in such a manner, "as will not unmistakably differentiate their goods and advertisements from those of complainant." There is nothing in Stix, Baer & Fuller Dry Goods Co. v. American Piano Company, 211 Fed. 271, 127 C. C. A. 639, which in any wise conflicts with this. Although that was not a registered trade-mark case, it was held: "If, however, the name has previously become well-known in trade, the second comer uses it subject to three important restrictions: (1) He may not affirmatively do anything to cause the public to believe that his article is made by the first manufacturer. (2) He must exercise reasonable care to prevent the public from so believing. (3) He must exercise reasonable care to prevent the public from believing that he is the successor in business of the first manufacturer."

There is nothing in the decree to prevent appellants from using their surnames, nor from publishing in their catalogues, and advertisements the training and knowledge of appellant William P. Stark in the nursery business. But the language employed in this part of the decree is in such general terms that appellants may be at a loss how to comply with the terms of the decree in every respect, and thus may inadvertently violate the injunction. To avoid this we deem it best, following the rule in the Hall Safe Case, 208 U. S. 560, and the Knabe Piano Case, 211 Fed. 271, 127 C. C. A. 639, to indicate in this opinion the decree to be entered on this branch of the case.

Nor is it material that appellants do not use appellee's trade-mark in its entirety, if what they do use is misleading and likely to cause confusion, whether the goods offered under this trade-mark are or are not those of the registrant. In Saxlehner v. Eisner & Mendelsohn Co., 179 U. S. 19, 33, it was held: "It is not necessary to constitute an infringement, that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article." In Ammon & Person v. Narragansett Dairy Co., 252 Fed. 276, 278, the registered trade-mark of plaintiff was "Queen of the West," and that of the defendant "Queen." The court in granting an injunction against the defendant, from using the trade-mark "Queen" said: "The unnecessary adoption of a part of a plaintiff's trade-mark—a part so substantial as to have become a trade-name or nickname for the goods—is generally regarded as an infringement. The use by a defendant of a trade-mark identical with the name which has been derived from a plaintiff's trade-mark proper, and has become sufficiently descriptive of plaintiff's goods, is the adoption of a mark which will cause its goods to bear the same name in the market. Neither subtractions from nor additions to a trade-mark proper will avoid infringement, when such imitation as is likely to lead to confusion still remains despite the changes," and authorities cited. The same principle was announced by this court in Rossman v. Garnier, 211 Fed. 401, 406,

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128 C. C. A. 73, 78. The use of "Stark City" as their address when their business is conducted at another city, Neosho, Missouri, is misleading and owing to the name likely to cause confusion. This is true not merely owing to the name "Stark" being used, but also for the reason that appellee and its predecessors have frequently advertised their business as at "Stark," "Starkdale," and "Stark Station," Missouri, having at some time maintained nurseries at some of these places.

The court committed no error in granting the injunction, but in order to avoid any misapprehension, there should be added to that part of the decree granting the perpetual injunction the following words: "That the defendants may use their surnames in circulars, catalogues or advertisements, but they must be accompanied by information that they are not of the original William Stark Nurseries, nor in any wise connected with the Stark Bros. Nurseries & Orchards Co., or any of its predecessors under whatsoever name their business was conducted; and that their trees are not the product of any of these concerns, nor their successors. It is further ordered and decreed, that for the purpose of distinguishing defendants' trees from
200 those of the complainant, the defendants shall insert in their circulars, catalogues and advertisements, a notice substantially as follows, and in form as conspicuous as the body of such circulars, catalogues or advertisements:

"Notice."

"The Stark Trees have been the product of the nursery business of the Stark family since the year 1816, and this nursery is still carried on by successors of the original Stark family at Louisiana, Missouri; that William P. Stark is a member of that family and was connected for over twenty-five years with, and learned the business from successors of the original Starks; that our business is conducted at Neosho, Missouri, and has no connection whatever with the nursery business of the Stark Bros. Nurseries & Orchards Co., at Louisiana, Missouri."

But, we are of the opinion that there was error in decreeing that appellee recover all gains and profits which appellants have derived or received by reason of the infringement of appellee's trade-mark, beginning March 11, 1914.

Section 28 of the Trade-Mark Act of February 20, 1905, 33 Stat. 730, par. 9514, U. S. Comp. St. 1916, after prescribing that notice of the registration of the mark be given by affixing on the mark or label the words "Reg. U. S. Pat. Off." which was not done by appellee, provides: "And in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice." As no notice was given by appellee to appellants of infringement of the registered trade-mark, although the words required by the statute were not printed on its trade-mark labels, until a few days before the institution of this ac-

tion, no damages under this act can be recovered for an infringement of the registered trade-mark before that time in this action. The trial court in its decree limited the damages for infringing the trade-mark to that time, but as to the gains and profits, held that the appellants are chargeable for unfair competition from March 11, 1914, when appellee had first complained that appellants' advertising matter constituted unfair competition.

201 As the jurisdiction of the court below depended solely on the fact that there was a federal question by reason of the registration of the trade-mark under the Act of Congress, there being no diversity of citizenship, there can be no liability on the charge of unfair competition prior to the notice under the Trade-Mark Act. To entitle one to recover in such a case, the unfair competition must be a part of the same transaction, to wit: a violation of the Act of Congress, and liability thereunder. It must be an aggravation of the infringement of the registered trade-mark, to give the court jurisdiction to award damages. A. Leschen Co. v. Bascom Co., 201 U. S. 166; Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446, 460; T. B. Wood's Sons Co. v. Valley Iron Works, 166 Fed. 770; Ross v. H. S. Geer Co., 188 Fed. 731, 734; Electric Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377; Planten v. Gedney, 224 Fed. 382, 386, 140 C. C. A. 68, 72; U. S. Bolt Co. v. Kroncke Hardware Co., 234 Fed. 868, 148 C. C. A. 466; Mallinson v. Ryan, 242 Fed. 951.

In the case at bar the unfair competition only became a part of the same transaction as the infringement of the registered trade-mark, after the notice had been given, as appellee's trade-mark labels had not the words required by the Act of Congress on them: "Reg. U. S. Patent Office." Had no notice been given by appellee, it could not have recovered any damages. This was expressly decided by this court in Roseman v. Garnier, 211 Fed. 401, 407, 128 C. C. A. 73, 79. None of the authorities relied on by counsel for appellee is in point. In Jacoway v. Young, 228 Fed. 630, 143 C. C. A. 152, the infringed trade-mark label had printed on it the words "Registered U. S. Patent Office," therefore that was notice. Ludwigs v. Payson Mfg. Co., 205 Fed. 60, 124 C. C. A. 194, and Detroit Show Case Co. v. Kawneer Mfg. Co., 250 Fed. 235, were actions for infringement of patents and it was held that a claim for unfair competition in connection with the sale of the infringing article, may properly be joined. But see Geneva Furniture Co. v. Karpen, 238 U. S. 254, 259; Shrauger & Johnson v. Phillip Bernard Co., 240 Fed. 131, decided by Judge Wade, not only fails to sustain counsel's contention, but is an authority to the contrary. While Judge Wade makes the statement

202 quoted by counsel for appellee, he proceeds: "In certain cases where there was combined the charge of infringement, and also unfair competition, courts have held that, even though the claim of infringement was decided in favor of the defendant, the court still could retain jurisdiction upon the question of unfair competition; but the large majority of the cases are the other way." After reviewing a large number of authorities, he holds: "If a bill presented two separate counts, stating two separate and independent causes of action, one for a patent infringement, and the other for unfair com-

petition, entirely independent of the infringement, I should hold that the cause of action for unlawful competition should be stricken out. The court has no such jurisdiction conferred by statute, and the rule contended for relates rather to the practice of a court of equity, than it does to the jurisdiction of the court."

When the case was at a later day finally heard before Judge Reed he sustained a motion to dismiss the petition as to the claim for infringing the plaintiff's alleged trade-mark, and for unfair competition for want of jurisdiction, 247 Fed. 547, 550.

Gains and profits made before notice was given under the Trade-Mark Act, in the absence of a label bearing the inscription prescribed by the Act of Congress, are independent of the Act of Congress and can only be recovered under the rules established by courts of equity in actions for unfair competition. Such an action can not be maintained in a national court in the absence of a diversity of citizenship. As was held in Standard Paint Co. v. Trinidad Asphalt Co., supra, "The opposite parties to the suit are citizens of different States, and while this diversity of citizenship was not necessary to give the Circuit Court jurisdiction of the case in so far as it involved the validity of the trade-mark, it was necessary to give the court jurisdiction of the issue of unfair competition."

Other questions have been discussed by counsel and have received our careful consideration, but we do not deem it necessary to pass on them in this cause.

The decree of the court below will be modified by adding to the injunction clause the words hereinbefore set forth, and that the appellants be charged with the gains and profits made by them by reason of the unfair competition arising from the infringe-
203 ment of appellee's registered trade-mark, and the damages, if any, which appellee has sustained by reason thereof since the beginning of this action.

The costs of this appeal will be taxed two-thirds to the appellants and one-third to the appellee.

Filed March 25, 1919.

204 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1918.

Tuesday, March 25, 1919.

No. 5181.

WILLIAM P. STARK and WILLIAM H. STARK, Trustees, Doing Business under the Name and Style of William P. Stark Nurseries, Appellants,

vs.

STARK BROTHERS NURSERIES AND ORCHARDS COMPANY.

Appeal from the District Court of the United States for the Western District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, modified in accordance with the opinion of this Court and that this cause be, and the same is hereby, remanded to the said District Court with directions to add to that part of its decree granting the perpetual injunction, the following words:

"That the defendants may use their surnames in circulars, catalogues or advertisements, but they must be accompanied by information that they are not of the original William Stark Nurseries, nor in any wise connected with the Stark Bro. Nurseries & Orchards Co., or any of its predecessors under whatsoever name their business was conducted; and that their trees are not the product of any of these concerns, nor their successors. It is further ordered and decreed,

205 that for the purpose of distinguishing defendants' trees from those of the complainant, the defendants shall insert in their circulars, catalogues and advertisements, a notice substantially as follows, and in form as conspicuous as the body of such circulars, catalogues or advertisements:

"Notice.

"The Stark Trees have been the product of the nursery business of the Stark family since the year 1816, and this nursery is still carried on by successors of the original Stark family at Louisiana, Missouri; that William P. Stark, is a member of that family and was connected for over twenty-five years with, and learned the business from successors of the original Starks; that our business is conducted

at Neosho, Missouri, and has no connection whatever with the nursery business of the Stark Bros. Nurseries & Orchards Co., at Louisiana, Missouri."

And it is further ordered, adjudged and decreed that the appellants be charged with the gains and profits made by them by reason of the unfair competition arising from the infringement of appellee's registered trade-mark, and the damages, if any, which appellee has sustained by reason thereof since the beginning of this action.

It is further ordered, adjudged and decreed that the costs in this Court be taxed two-thirds to the appellants and one-third to the appellee and that William P. Stark and William H. Stark, Trustees doing business under the name and style of William P. Stark Nurseries have and recover against the Stark Brothers Nurseries and Orchards Company the sum of — dollars and have execution therefor, said amount being one-third of the costs in this Court.

March 25, 1919.

206 In the United States Circuit Court of Appeals, Eighth Circuit.

In Equity. No. 5181.

WM. P. STARK ET AL., Appellants,

vs.

STARK BROS. NURSERIES & ORCHARDS CO., Appellee.

Petition for Rehearing.

Now come Stark Bros. Nurseries & Orchards Company, appellee in the above entitled cause, and petition for a rehearing thereof, and for grounds of said petition respectfully state the following reasons:

In its opinion this Honorable Court says:

"But, we are of the opinion that there was error in decreeing that appellee recover all gains and profits which appellants have
207 derived by reason of the infringement of appellee's trade-mark beginning March 11, 1914.

"Sect. 28 of the Trade-Mark Act of Feb. 20, 1905, 33 Stat. 730, par. 9514, U. S. Comp. St. 1916, after prescribing that notice of the registration of the mark be given by affixing on the mark or label the words 'Reg. U. S. Pat. Off.,' which was not done by appellee, provides: 'and in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice.' As no notice was given by appellee to appellants of infringement of the registered trade-mark, although the words required by the statute were not printed on its trade-mark labels until a few days before the institution of this action, no damages under this Act can be recovered for an infringement of the registered trade-mark before that time in this action.

"• • • and that the appellants be charged with the gains and profits made by them by reason of the unfair competition arising from the infringement of appellee's registered trade-mark, and the damages, if any, which appellee has sustained by reason thereof since the beginning of this action."

We respectfully submit that, notwithstanding that the record abounds with proof that appellants were aware of appellee's rights and that those rights were repeatedly asserted, appellee's letter under date of March 11, 1914, was, as the trial court found, sufficient notice to the appellants under the above quoted statute. That letter is found on page 37 of the record, and copied here:

208 Wm. P. Stark Nurseries, Neosho, Mo.

Attention of Wm. P. Stark.

GENTLEMEN:

The literature and advertising matter that you have recently sent to the officials of this company, concerning certain claims relative to Delicious Apple and other matters, mis-state the facts and constitute unfair competition and are infringements on the rights of Stark Bros. Nurseries & Orchards Company. We hereby notify you to discontinue the unfair competition and infringement on our rights.

Very truly yours,

STARK BROS. N. & O. CO.,
By E. W. STARK,
President.

A careful analysis of the above referred statute, which, after all, was enacted to protect innocent parties and not deliberate unfair traders, such as the trial court (Record, p. 187) and this Honorable Court found appellants to be, simply means that if any owner of a registered trade-mark does not print the notice on the label he cannot recover damages unless he proves not that the infringer was notified of the registration, but "of infringement, and continued the same after such notice."

We respectfully submit that appellee fulfilled the requirements of that really so-far unlitigated section of the statute, when it wrote these words on March 11, 1914:

"We hereby notify you to discontinue the unfair competition and infringements on our rights."

209 The record, of course, shows, as the trial court found, that appellants did not even reply to this letter and not only continued to infringe by using the infringing mark on goods and in advertisements, and in every conceivable way, but as a careful analysis of the record will show, increased their efforts to unfairly gain advantage of the reputation of the Stark name and Stark trade-mark.

It is an academic proposition of trade-mark law that registration of a trade-mark adds nothing to, nor subtracts nothing from, common law rights, but merely gives jurisdiction to Federal Courts for

the infringement of a trade-mark when the parties are citizens of the same State.

We respectfully request this Honorable Court to give us an opportunity to argue these two important questions at length at a rehearing.

Respectfully submitted,

STARK BROS. NURSERIES & ORCHARDS CO.,
By ANDREW B. REMICK AND JOHN M. MATSON,
Counsel.

Certificate of Counsel.

I, Andrew B. Remick, Counsel for Appellee, hereby certify that in my judgment the foregoing Petition for Rehearing is true in point of fact and well founded in point of law, and is not interposed for delay.

ANDREW B. REMICK,
Attorney for Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 24, 1919.

219 (*Order Denying Petition for Rehearing.*)

May Term, 1919.

Friday, June 6, 1919.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellee.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

June 6, 1919.

(*Motion of Appellee for Stay of Mandate.*)

Comes again the Appellee, by its attorneys, and humbly petitions and moves the Court to make an order herein to stay the mandate and to allow it a reasonable time in which to apply to the United States Supreme Court for a writ of certiorari to review the decree and proceedings in its cause above entitled.

And your petitioner will ever pray, etc.

ANDREW B. REMICK &
J. M. MATSON,
Attorneys for Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 6, 1919.

211 *(Order Staying Mandate.)*

May Term, 1919.

Friday, June 6, 1919.

Upon consideration of the motion of appellee for an order staying the issuance of the mandate of this Court pending an application to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate of this Court be, and the same is hereby, stayed until October 27, 1919, on condition that said application for writ of certiorari be filed in said Supreme Court within three months from this date and presented upon the convening of the October term, 1919.

June 6, 1919.

212 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Missouri, as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress approved February 13, 1911, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein William P. Stark and William H. Stark, Trustees doing business under the name and style of William P. Stark Nurseries, were Appellants, and the Stark Brothers Nurseries and Orchards Company, was Appellee, No. 5181, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this nineteenth day of August, A. D. 1919.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

213 United States Circuit Court of Appeals, Eighth Circuit.

No. 5181.

WILLIAM P. STARK et al., Appellants,

vs.

STARK BROS. NURSERIES & ORCHARDS COMPANY, Appellee.

Appeal from the District Court of the United States for the Western District of Missouri.

Stipulation as to Return of Writ of Certiorari.

The Supreme Court of the United States having issued, under date of October 20, 1919, a writ of certiorari, directing the record and proceedings in said cause be sent to the said Supreme Court, it is hereby stipulated and agreed between counsel for both parties, in said cause, that the certified transcript of the record which has already been filed, with the petition for the writ of certiorari in the Supreme Court, may be taken as a return to said writ of certiorari.

XENOPHON P. WILFLEY,
Counsel for Appellants.
ANDREW B. REMICK,
Counsel for Appellee.

October 29,1919.

(Endorsed:) No. 5181. William P. Stark, et al., Trustees, Appellants, v. Stark Bros. Nurseries & Orchards Company. Stipulation as to return to Writ of Certiorari. Filed Nov. 24, 1919, E. E. Koch, Clerk.

214 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which William P. Stark and William H. Stark Trustees, doing business under name and style of William P. Stark Nurseries, are appellants, and Stark Bros. Nurseries & Orchards Company is appellee, No. 5181, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Missouri, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of

Appeals and removed into the Supreme Court of the United
215 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of October, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

216 *Return to Writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of William P. Stark et al., Appellants, vs. Stark Bros. Nurseries & Orchards Company, No. 5181, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-eighth day of November, A. D. 1919.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] File No. 27,291. Supreme Court of the United States. No. 536, October Term, 1919. Stark Bros. Nurseries & Orchards Company vs. William P. Stark et al. Writ of Certiorari. Filed Nov. 24, 1919. E. E. Koch, Clerk.

217 [Endorsed:] File No. 27,291. Supreme Court U. S. October Term, 1919. Term No. 536. Stark Bros. Nurseries & Orchards Co., Petitioner, vs. William P. Stark et al. Writ of certiorari and return. Filed Dec. 1, 1919.

FILED
SEP 6 1919
JAMES D. MAHER, CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. ~~596~~ 171

STARK BROS. NURSERIES & ORCHARDS CO.,
Petitioner,

vs.

WM. P. STARK ET AL.,
Respondents.

Notice of Motion, Motion and Petition

ANDREW B. REMICK,
Counsel for Petitioner.
Pierce Building, St. Louis, Mo.

Nixon Brief Printing Company, St. Louis, Mo.

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UNITED STATES CIRCUIT COURT OF APPEALS

For the Eighth Circuit

In Equity—No. 5181

WM. P. STARK ET AL.,
Appellants,
vs.
STARK BROS. NURSERIES & ORCHARDS CO.,
Appellee.

NOTICE.

To the above named Wm. P. Stark et al. and their Attorney.

Sirs: Please take notice that the appellee in the above entitled cause, Stark Bros. Nurseries & Orchards Company, on Monday, the 6th day of October, 1919, at the opening of court on that day, or as soon thereafter as counsel can be heard, will submit to the Supreme Court of the United States, in its court room in the Capitol Building, in the City of Washington, District of Columbia, the within Motion for Writ of Certiorari from said Supreme Court of the United States to the United States Circuit Court of Appeals for the Eighth Circuit, and that such motion will be made upon the petition hereto attached and a copy of the record in this cause.

Dated September 20, 1919.

ANDREW B. REMICK,
Attorney for Appellee.
Pierce Building, St. Louis, Mo.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition for a writ of certiorari are hereby acknowledged at St. Louis, Mo., this 20th day of September, 1919.

XENOPHON P. WILFLEY,
Attorney for Appellants.

SUPREME COURT OF THE UNITED STATES

October Term, 1919

STARK BROS. NURSERIES & ORCHARDS CO.,
Petitioner,

vs.

WM. P. STARK ET AL.,
Respondents.

MOTION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Come now Stark Bros. Nurseries & Orchards Company, by Andrew B. Remick, its counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the Petitioner, Stark Bros. Nurseries & Orchards Company, was Appellee, and Respondent, Wm. P. Stark et al. was Appellant; and that pending the final determination in this Court of the questions presented, this Court shall issue an order to said United States Circuit Court of Appeals for the Eighth Circuit and to the District Court of the United States for the Western District of Missouri, Southwestern Division, directing that all proceedings in this cause be stayed until the further order of this Court; and to that end it now tenders its petition with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

ANDREW B. REMICK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

STARK BROS. NURSERIES & ORCHARDS CO.,
Petitioner,
vs.
WM. P. STARK ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Stark Bros. Nurseries & Orchards Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, and having its principal place of business in the City of Louisiana, State of Missouri, respectfully shows:

In 1916 your Petitioner filed suit in the Southwestern Division of the Western Judicial District of Missouri against respondents for infringement of the registered trade-mark "Stark Trees," and for unfair competition in the use of the name Stark. Both parties are growers and sellers of fruit trees and other nursery stock and are both residents of the State of Missouri. Since there was no diversity of citizenship the Federal Court could only take jurisdiction of the case because your Petitioner had secured registration in the United States Patent Office of the trade-mark in suit.

Upon proofs and final hearing the District Court, speaking through his Honor, Judge Van Valkenburgh, found that respondents not only had deliberately in-

fringed your Petitioner's registered trade-mark, "Stark Trees," but had used practically every conceivable means of unfairly using the name Stark to the great detriment and damage of Petitioner and benefit to themselves. (R. 180, 187.)

The trial court ordered and decreed that

> "the complainant (your Petitioner) do recover of the defendants (respondents), Wm. P. Stark, Wm. H. Stark and the Wm. P. Stark Nurseries, all gains and profits which said Wm. P. Stark, Wm. H. Stark and the Wm. P. Stark Nurseries have derived, received or made during the period within which complainant's said trade-mark is shown to have been infringed, beginning with the 11th day of March, 1914, and that said complainant do also recover from said Wm. P. Stark, Wm. H. Stark and the Wm. P. Stark Nurseries any and all damages which complainant has sustained by reason of defendant's infringement and unfair competition from and after the 26th day of August, 1916, on which date complainant gave notice to defendants of the registration of its said trade-mark." (R. 15.)

The trial court set the above date of March 11, 1914, as the date from which the profits should run, because your Petitioner's president on that date wrote and mailed a letter to respondents saying and demanding, among other things:

> "We hereby notify you to discontinue the unfair competition and infringement of our rights." (R. 37.)

While damages were ordered and decreed from and after August 26, 1916, because that was the date on which Petitioner, through its counsel, wrote a formal letter of complaint threatening to bring suit if respondents did not cease their infringement and unfair competition.

It was found and admitted that your Petitioner did not put on its labels bearing its registered trade-mark the statutory notice, "Reg. U. S. Pat. Off.," as is directed by Section 28 of the Trade-Mark Statutes, which provides that:

> "In any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement and continued the same after such notice."

The trial court also held that

> "the complainant's trade-mark having been found valid, this court has jurisdiction of the parties, and of the subject-matter for the purpose of enjoining not only the infringing of that trade-mark, but also all wrongful acts in the nature of unfair trade done in connection with the infringement which augment and aggravate the wrong." (R. 185.)

Respondents appealed from the decision of the lower court to the United States Circuit Court of Appeals for the Eighth Circuit, and the Court of Appeals (Judges Sanborn and Stone, Circuit Judges, and Trieber, District Judge), speaking through his Honor, Judge Trieber, held that

"the Court below committed no error in granting the injunction. * * * But we are of the opinion that there was error in decreeing that Appellee recover all gains and profits which Appellants have derived or received by reason of the infringement of Appellee's trade-mark, beginning March 11, 1914." (R. 198.)

"Section 28 of the Trade-Mark Act of February 20, 1905, 33 Sta. 730, par. 9514, U. S. Comp. St. 1916, after prescribing that notice of the registration of the mark be given by affixing on the mark or label the words 'Reg. U. S. Pat. Off.,' which was not done by Appellee, provides: 'And in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice.' As no notice was given by Appellee to Appellants of infringement of the registered trade-mark, although the words required by the statute were not printed on its trade-mark labels, until a few days before the institution of this action, no damages under this Act can be recovered for infringement of the registered trade-mark before that time in this action." (R. 198.)

The Court of Appeals also held that

"as the jurisdiction of the court below depended solely on the fact that there was a federal question by reason of the registration of the trade-mark under the Act of Congress, there being no diversity of citizenship, there can be no liability on the charge of unfair competition prior to the notice under the Trade-Mark Act. To entitle one to recover in such a case the unfair competition must be a part of the same transaction, to-wit: a viola-

tion of the Act of Congress, and liability thereunder. It must be an aggravation of the infringement of the registered trade-mark, to give the Court jurisdiction to award damages." (R. 199.)

"In the case at bar the unfair competition only became a part of the same transaction as the infringement of the registered trade-mark, after the notice had been given, as Appellee's trade-mark labels had not the words required by the Act of Congress on them—'Reg. U. S. Pat. Off.' Had no notice been given by Appellee it could not have recovered any damages. This was expressly decided by this Court in Rossman v. Garnier, 211 Fed. 401-407, 128 C. C. A. 73-79." (R. 199.)

"Gains and profits made before notice was given under the Trade-Mark Act, in the absence of a label bearing the inscription prescribed by the Act of Congress, are independent of the Act of Congress and can only be recovered under the rules established by courts of equity in actions for unfair competition. Such an action cannot be maintained in a national court in the absence of a diversity of citizenship." (R. 200.)

Thereafter your Petitioner filed a Petition for Rehearing in said Circuit Court of Appeals, respectfully requesting that Honorable Court to give your Petitioner an opportunity to argue at length these two important propositions:

1. That the above referred-to statute does not mean that the infringer must be notified of the **registration** of the trade-mark, but does mean in the absence of constructive notice of registration that the infringer must be notified "of **infringement**, and continued the same after such notice," in order to recover damages.

2. That it is an academic proposition of trade-mark law that registration adds nothing to, nor subtracts nothing from, common law rights, but merely gives jurisdiction to Federal Courts for the infringement of a trade-mark when the parties are citizens of the same State.

Your Petitioner shows that said Petition for Rehearing was denied without Opinion, by letter from the Clerk dated June 7, 1919.

Your Petitioner respectfully submits that it was satisfied with the decree of the trial court, but that the Court of Appeals erred in holding that the letter of March 11, 1914, was not sufficient notice (even disregarding the fact that respondents positively knew of your Petitioner's trade-mark and rights even prior to the inception of their infringing use—Rec. 187); erred in holding that "the unfair competition only became a part of the same transaction as the infringement of the registered trade-mark, after the notice had been given, as Appellee's trade-mark labels had not the words required by the Act of Congress on them—'Reg. U. S. Patent Office' "; erred in dating the accounting and damages from the date of filing the suit; and erred in not holding that—in view of the fact that respondents continued infringing and practicing unfair competition (R. 188) after suit was filed, which surely is unquestionable notice—respondents be ordered to account to your Petitioner all gains and profits from the beginning of the infringement and unfair competition.

Your Petitioner therefore believes the aforesaid decree of the Court of Appeals for the Eighth Circuit is erroneous, and this Honorable Court should require the

said cause to be certified to it for its review and determination, because the question involved is of sufficient, general, national and material importance and interest as to make it necessary that the question presented should be determined by the Court of last resort.

Wherefore, your Petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, requiring that Court to send a full and complete transcript of the record in the above entitled cause to this Honorable Court for its review and determinaiton.

ANDREW B. REMICK,
Counsel for Petitioner.

I hereby certify that I am counsel for the Petitioner herein, Stark Bros. Nurseries & Orchards Company; that the allegations of fact contained in said petition are true, and that said petition in my opinion is well founded in law as well as fact.

ANDREW B. REMICK,
Counsel for Petitioner.

State of Missouri
City of St. Louis } ss.

Andrew B. Remick, being duly sworn, deposes and says that he is counsel for the Petitioner herein, Stark Bros. Nurseries & Orchards Company; that he prepared the foregoing petition for a writ of certiorari, and that the allegations of said petition are true, as he is informed and verily believes.

ANDREW B. REMICK.

Sworn to before me this 4th day of September, 1919.

(Seal) GEORGE S. TOURVILLE,
Notary Public.

My commission expires April 2, 1921.

In the

UNITED STATES CIRCUIT COURT OF APPEALS

Eighth Circuit

In Equity—No. 5181

WM. P. STARK ET AL.,
Appellants,
vs.
STARK BROS. NURSERIES & ORCHARDS CO.,
Appellee.

PETITION FOR REHEARING

Now come Stark Bros. Nurseries & Orchards Company, appellee in the above entitled cause, and petition for a rehearing thereof, and for grounds of said petition respectfully state the following reasons:

In its opinion this Honorable Court says:

> "But we are of the opinion that there was error in decreeing that appellee recover all gains and profits which appellants have derived by reason of the infringement of appellee's trade-mark beginning March 11, 1914.
>
> "Section 28 of the Trade-Mark Act of February 20, 1905, 33 Stat. 730, par. 9514, U. S. Comp. St. 1916, after prescribing that notice of the registration of the mark be given by affixing on the mark or label the words 'Reg. U. S. Pat. Off.,' which was not done by appellee, provides: 'and in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered,

except on proof that the defendant was duly notified of infringement, and continued the same after such notice.' As no notice was given by appellee to appellants of infringement of the registered trade-mark, although the words required by the statute were not printed on its trade-mark labels until a few days before the institution of this action, no damages under this Act can be recovered for an infringement of the registered trade-mark before that time in this action.

" • • • and that the appellants be charged with the gains and profits made by them by reason of the unfair competition arising from the infringement of appellee's registered trade-mark, and the damages, if any, which appellee has sustained by reason thereof since the beginning of this action."

We respectfully submit that, notwithstanding that the record abounds with proof that appellants were aware of appellee's rights and that those rights were repeatedly asserted, appellee's letter under date of March 11, 1914, was, as the trial court found, sufficient notice to the appellants under the above quoted statute. That letter is found on page 37 of the record, and copied here:

Wm. P. Stark Nurseries,
Neosho, Mo.

Attention of Wm. P. Stark.

Gentlemen:

The literature and advertising matter that you have recently sent to the officials of this company, concerning certain claims relative to Delicious Apple and **other matters**, mis-state the facts and constitute unfair competition and are **infringements**

on the rights of Stark Bros. Nurseries & Orchards Company. We hereby notify you to discontinue the unfair competition and infringement on our rights.

Very truly yours,
Stark Bros. N. & O. Co.,
By E. W. Stark, President.

A careful analysis of the above referred-to statute, which, after all, was enacted to protect innocent parties and not deliberate unfair traders, such as the trial court (Record, p. 187) and this Honorable Court found appellants to be, simply means that if any owner of a registered trade-mark does not print the notice on the label he cannot recover damages unless he proves not that the infringer was notified of the registration, but "of infringement, and continued the same after such notice."

We respectfully submit that appellee fulfilled the requirements of that really so-far unlitigated section of the statute, when it wrote these words on March 11, 1914:

> "We hereby notify you to discontinue the unfair competition and **infringement on our rights.**"

The record, of course, shows, as the trial court found, that appellants did not even reply to this letter and not only continued to infringe by using the infringing mark on goods and in advertisements, and in every conceivable way, but as a careful analysis of the record will show, increased their efforts to unfairly gain advantage of the reputation of the Stark name and Stark trade-mark.

It is an academic proposition of trade-mark law that registration of a trade-mark adds nothing to, nor subtracts nothing from, common law rights, but merely gives jurisdiction to Federal Courts for the infringement of a trade-mark when the parties are citizens of the same State.

We respectfully request this Honorable Court to give us an opportunity to argue these two important questions at length at a rehearing.

Respectfully submitted,

STARK BROS. NURSERIES & ORCHARDS CO.,
By Andrew B. Remick and John M. Mateer,
Counsel.

CERTIFICATE OF COUNSEL.

I, Andrew B. Remick, Counsel for Appellee, hereby certify that in my judgment the foregoing Petition for Rehearing is true in point of fact and well founded in point of law, and is not interposed for delay.

ANDREW B. REMICK,
Attorney for Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 171

STARK BROS. NURSERIES & ORCHARDS COMPANY,

Petitioner,

vs.

WILLIAM P. STARK and WILLIAM H. STARK, Trustees, Doing Business under Name and Style of William P. Stark Nurseries,

Respondents.

Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Brief and Argument for the Petitioner

STATEMENT.

This suit was instituted by the petitioner, Stark Bros. Nurseries and Orchards Company, in the United

States District Court for the Southwestern Division of the Western District of Missouri, to enjoin the infringement of a trade-mark and unfair methods of competition in the business to which the trade-mark is attached, viz., the propagation, growing and sale of fruit trees.

PETITIONER'S CASE.

Petitioner is the grower and seller of the nursery products Stark Trees.

The name Stark Trees is registered as a trade-mark under the Act of Congress of February 20, 1905. This registration is, and always has been since it was issued, the sole property of petitioner Stark Bros. Nurseries & Orchards Company.

The name Stark Trees for a quarter of a century has meant and designated exclusively the product of the petitioner, and the name Stark has been associated with the nursery business for a century.

Petitioner's case is based upon the fraudulent and infringing use by respondents of a colorable imitation of the trade-mark Stark Trees and name Stark in the nursery business.

RESPONDENT'S DEFENSE.

Respondents by answer deny right and title of petitioner to the trade-mark Stark Trees and the name Stark; deny infringement of trade-mark and acts of unfairly using the name Stark charged against them, and jurisdiction.

THE EVIDENCE.

The record shows, and the answer admits, that petitioner, through its predecessors, has used the name Stark in the nursery business since the year 1816. In fact, the name Stark for generations has been associated with petitioner's products, as is indicated by the widely published advertisement prepared under the supervision of respondent W. P. Stark in 1910, when he was an officer and employe of petitioner. This advertisement reads:

> "If you buy Stark Trees you are just as sure of sterling quality as the silver buyer is of his silver. For three-quarters of a century the word 'Stark' has stood for all that is good in nursery stock. Tree planters the world over regard the word 'Stark' as synonymous with quality trees * * * " (Rec., p. 51; Ex. 40.)

In addition to the common-law rights claimed by petitioner to the name Stark and Stark Trees, petitioner, on June 24, 1913, was granted registration of the trade-mark Stark Trees by the Patent Office under the ten-year clause of the Act of 1905. Petitioner has used this trade-mark in stencil and label form on interstate shipments of trees continuously from the year 1893 to the present time (Rec., pp. 26, 51, 56, 57, 58).

This trade-mark, as early as 1898, was featured in advertising covering the whole country and in succeeding years (Rec., p. 85, Ex. X177; E. W. S. Exs. 25, 26). The record shows that since 1893 thousands of orders have been shipped bearing the trade-mark Stark Trees to various points of the country, and

many times the trees were retailed out of boxes bearing the identifying mark, Stark Trees (Rec., p. 28).

Then came respondents with this trade-mark (Rec., p. 200, Ex. "C") and put it not only on labels attached to trees that were sold, but printed an exact reproduction of the label in extensive advertising (E. W. S., Ex. 39), and ran a similar cut of the trade-mark prominently at the top of each and every page of their catalogue for several years (E. W. S., Exs. 15-16).

On August 26, 1916, petitioner's attorney wrote defendants specifically about this infringing trade-mark (E. W. S., Ex. 28), but no reply was received, whereupon petitioner brought suit on September 11, 1916, and after suit was brought respondents continued to use and advertise the infringing mark (R., p. 67, Ex. Z2). In fact, respondents admitted that they continued for some time after the suit was filed to use and advertise the labels bearing the infringing trade-mark (Rec., p. 116).

Now, to adequately show respondents' extensive unfair competition underlying this case, which is intertwined and really inseparable from the trade-mark infringement aspects of the case, we feel it practically necessary to briefly review the history of the respondents, Wm. P. Stark and Wm. H. Stark, as disclosed throughout the record.

About the year 1880, William Stark died, leaving his almost insolvent nursery to his three sons, C. M., E. W. and W. P. Stark. C. M. and E. W. Stark formed the firm of Stark & Co., put in their own money, paid off the father's debts, kept W. P. Stark in school, and,

several years later, when W. P. Stark became of age, he was taken in the firm as full partner. Thereafter W. P. Stark was an active man in the office of the firm and the succeeding corporations, and his name became quite well known to petitioner's customers and prospective customers.

In 1909, then owning about $300,000.00 of the $1,000,000.00 capital stock of the petitioner company, W. P. Stark tried to gain control of petitioner company, but to no avail. Again, in 1910, he tried to get control of petitioner company by suggesting to E. W. Stark a deal whereby the other interests would be eliminated. These different attempts to get control of the petitioner company failed. So in the spring of 1911 W. P. Stark, his son, W. H. Stark, and son-in-law, E. M. Wilson, made demands for exorbitant salaries and a stranglehold on the offices, and, failing, resigned. In September W. P. and W. H. Stark, leading the company to believe all differences and friction had been eliminated, came back to the petitioner company in their old positions.

A few days after his return to the petitioner company W. P. Stark was sent East for the company to see a man named Hale about a valuable peach which the company had been corresponding about, and briefly, W. P. Stark later made a contract with Hale about this peach in his own name. Such actions, of course, opened up new friction, and many of W. P. Stark's actions after that visit to Hale indicate that he was secretly planning to either get control of petitioner company and introduce the valuable peach or start a competing nursery of a similar name and con-

trol the new Hale peach, which petitioner had sent him East to procure for the company (R., pp. 33, 34, 35).

Whereupon, in June, 1912, the William Stark Nurseries, backed by W. P. Stark (R., p. 163), and managed by his son, W. H. Stark, were announced with the address of Louisiana, Mo., the home of the old Stark Nurseries for almost a century, while W. P. Stark was still actively connected with the petitioner company. Naturally much confusion of mail matter followed and upon complaint to the postal department and a hearing, the department held that there was clearly an attempt on the part of the Wm. Stark Nursery to get mail of an established concern (R., p. 37; Ganss Ex. X-1, R., p. 71). The effect of this ruling caused the Wm. Stark Nurseries to get out of Louisiana, Mo., moving their offices to a little town named Chester, and changing the name of their concern to William P. Stark Nurseries. Soon after the removal, the town Chester was changed to Stark City and widely advertised, in spite of the fact that the real offices of W. P. Stark Nurseries were at Neosho, Mo., some ten miles away. It has been positively shown by respondents' own testimony that W. H. Stark engineered the securing of this Stark City address while he was still on the payroll of the petitioner company (R., pp. 132, 133, 134).

This evidence impelled the trial court to emphatically say that:

> "The testimony of the defendants with respect to this incident was most unsatisfactory, and it

> was apparent to the court that the change of name was brought about at their instance and for the purpose charged in the bill (R., p. 190).

In fact, the record abounds with facts which should indicate to any unbiased mind that W. P. Stark and his son and follower, W. H. Stark, long before leaving petitioner company deliberately planned the foundation of a competing nursery of similar name, with the view of launching their business at the expense of the old petitioner company, well knowing that they could confuse a great number of petitioner's customers and prospective customers into buying from the new nursery, in the belief that they were doing business with the old petitioner company.

It does not take any stretch of imagination to conclude why W. P. Stark unduly familiarized his name and his son's name in petitioner's Planting Book (E. W. S., Ex. 4-5), and in the Year Book of 1910 and 1911 (E. W. S., Ex. 6, 7, 8, 9, 11), or why W. P. Stark, while he was with petitioner company, prepared extensively circulated advertisements featuring the addresses Stark and Starkdale (E. W. S., Ex. 12, A, B, C, D, E, F and 23). W. P. Stark undoubtedly knew that mail had been coming to the petitioner company addressed Starkdale, Stark Station, and Stark, Mo.

Did not the trial court find that,

> "Those names were used in advertising to distinguish and localize complainant's business. The adoption of so similar a name as Stark City by defendants was obviously intended to introduce another element of confusion in the public mind." (R., p. 190)?

It is shown that W. P. Stark, while still with petitioner company, joined the other officials, particularly in the spring of 1911, to secure a Stark City or Stark address (R., p. 38).

Then in petitioner's Year Book of 1910 (E. W. S., Ex. 6, p. 115) prepared under the direction of W. P. Stark, the following appeared: "We refer the reader to our Special Service Department, which is in charge of men of long practical training, and who, in turn, are under the personal supervision of our Mr. W. P. Stark", and in petitioner's Year Book of 1911—just about the time that W. P. Stark undoubtedly was planning on starting a rival nursery bearing the name Stark—also prepared by W. P. Stark appeared this statement (E. W. S., Ex. 7, p. 15): "Commercial orchardists will be interested in our co-operative plan for the commercial planting of Liveland raspberry. Full information will be sent on request, which should be addressed to Mr. W. P. Stark personally." W. P. and W. H. Stark, about this time, prominently advertised their names in petitioner's big advertisement in the Fruit Grower (E. W. S., Ex. 8).

When it is considered that many thousands of these books and advertisements were disseminated it seems reasonable to contend that W. P. and W. H. Stark voluntarily, but against the protests of the president (R., pp. 32, 33), so connected their names with that of petitioner company as to amount to selling their names to petitioner, or, in fact, to preclude them from afterwards using their names in a rival business.

We repeat, we do not comprehend how we can otherwise contend but that the entire conception of the respondents' nurseries were steeped in fraud of the direst and brazonest sort, which ought to shock judicial sensibilities.

We do not wish to write the whole record into this brief, but we feel that it would be slighting petitioner's cause if we did not dwell on the following statements published in catalogues and publications by respondents, almost immediately after their fraudulent beginning, with the view of securing the benefits of petitioner's long enjoyed use of the name **Stark:**

> "The name of 'Stark' has for nearly a century been associated with the nursery business of America, and for the last quarter of a century William P. Stark has made the name a sort of a trade-mark for big things in the nursery world. Now, with William P. Stark's great name and life-long experience to direct affairs, and William H. to assist, the William P. Stark Nurseries are in a better position than ever to continue and broaden the Stark Nursery business in Missouri at their Stark City plant" (R., pp. 38, 39, Exs. 14-15-16).

This statement appeared in respondents' catalogues for several successive years, and similar statements appeared in publications such as the "Country Gentleman", a magazine of large circulation (E. W. S., p. 39, Ex. 17). Then another confusing and deceptive statement about the Stark identity appeared in respondents' year book (Ex. X188, pp. 99-100), where it reads:

"Four generations of William Stark nurserymen. The commission men of South Water street looked sideways when William P. Stark commenced over ten years ago to tell us of Delicious, Stayman, Winesap, Black Ben, Liveland Raspberry and others.

"William P. Stark certainly knows what varieties for the commercial grower to plant and what not to plant. Of course, the Starks have been doing just this sort of thing for ninety years or more, so it is no new thing to have the trade come around and back up Stark's judgment, as they have in the case of Delicious, Stayman and others.

"William P. Stark is a real nurseryman and fruit grower. He doesn't pretend to be anything else. Of the four generations of William Starks three are living today, and there was still another generation of Starks before the first William Stark engaged in horticultural work."

Also, in some of these catalogues, for example, Exhibit 14, page 24, this misleading statement appeared:

"The Florence originated with the late Peter Gideon of Minnesota, and was secured for propagation by William P. Stark twenty-six years ago."

Petitioner company, in fact, secured the Florence and those other varieties, and not W. P. Stark (R., p. 38).

For many years, while W. P. Stark was with petitioner, the Delicious apple was widely and expensively advertised as having been introduced by petitioner. In fact, W. P. Stark as treasurer of petitioner

signed the application for registration of Delicious (R., pp. 43-44-45, Ex. 29), and W. P. Stark prepared many advertisements for petitioner dwelling on the rights of the company to this famous apple. So when W. P. Stark started his infringing nursery, in order to make the public believe his nursery was the one that had widely advertised the Delicious, he ran advertisements such as these:

> "Two or three years after this two barrels were shipped to William P. Stark, who was ever on the lookout for something meritorious, and immediately recognizing their superiority, commenced negotiations for their propagation. Only for William P. Stark the Delicious apple might never have been known. It was William P. Stark who came to the rescue, saved the apple and gave it to the pomological world." (Rec., p. 45, Ex. 33).

When these misleading advertisements were run the Wm. P. Stark Nurseries were about a year old (R., p. 45). There were a number of these misleading advertisements about the Delicious, and under pressure from petitioner, respondents agreed in what is known as the Kansas City agreement (Rec., p. 47, Ex. 34) to cease the advertising referring to the ownership or discovery of the Delicious apple, but respondents several years later deliberately broke faith with this agreement, as is evidenced by this advertisement published throughout the country in January, 1917:

> "William P. Stark was the first to recognize the merits of this great apple. He named it 'The Delicious' and had the foresight and courage to

propagate it and to urge growers to plant it." (Rec., p. 50, Ex. 35.)

This deceptive use of the Delicious matter caused the Trial Court to remark:

> "He cannot now draw to himself individual credit therefor to the extent of invading the property rights of complainant and substituting himself for complainant to the confusion of the public."

In addition to a large mail order business, petitioner maintains an organization of about 5,000 salesmen or tree agents, so respondents widely circulated form letters and published advertisements like this: "We have heard of a man in your community who claims to be our agent; he is a fake" (E. W. S., Ex. 21) and "Look out for agents claiming to represent us; they are frauds" (Rec., p. 40, E. W. S. Ex. 22).

It is impossible to determine how much these circulars (which, by the way, strangely seemed to reach every new prospect petitioner's salesmen sent in) hurt the business of petitioner and the morale of the salesmen. However, reference to the record will show that much damage was done to petitioner's salesmen's business because of the confusion caused by these letters and advertisements deliberately disseminated by respondents (Testimony of Salesmen Jamison, Board, Straight, Warwick and Gilmore, Rec., pp. 58-66 inc.).

Another subtle and deceptive method by which respondents damaged petitioner's business is this announcement which appeared, not in the advertising

for inquiries, but in respondents' 1915 catalogue (Def.'s Ex. A, p. 44), which was sent to inquirers:

> "No connection with any other concern. The William P. Stark Nurseries is not connected or related in any way with any other nursery with similar name."

This statement and the one *supra*, "Look out for agents claiming to represent us. He is a fake," in the words of the Trial Court, "so far from absolving defendants from the charge of unwarranted encroachment, in point of fact, under the circumstances revealed by this record, really invite the public to regard the defendants as the original Starks, and all others of similar name as interlopers in the nursery business in Missouri." (R., p. 190.)

The fact that W. P. Stark was owner of about $300,000 of the capital stock of petitioner company and used practically every method of unfair competition to secure petitioner's business, should uphold our contention that he deliberately set out to unfairly compete against petitioner's business with the view in mind of eventually gaining even more than $300,000 advantage of the old petitioner company, and in that event he could well afford to let his holdings in petitioner company be wiped out along with the remaining $700,000 holdings of the other Stark interests in the petitioner company.

It is a significant fact that petitioner's mail order business showed a total loss of sales of $387,349.00 in four years after W. P. Stark's competition as against the four years prior to W. P. Stark's competition

(R., p. 28). And in this connection it is also significant that in a like period petitioner increased its advertising expenditures after respondents started in competition (R., p. 27).

That much damaging confusion has resulted from respondents' deliberate and deceptive use and advertising of the Stark name and address Stark City is evidenced by a large number of letters (Stip. Ex. X2 to X56, Rec. pp. 67 *et seq.*) introduced by petitioner, and also in numerous other letters (P. C. S. Exs.) introduced by petitioner. Not only confusion, but loss of sales intended for plaintiff are evidenced by such letters as the Kershaw letter (P. C. S. Ex. 83-84) wherein the writer, after asking whether petitioner was connected with respondents, further stated: "I sent them a small order last week, thinking I was sending it to you." These exhibits (Stip. and P. C. S.) also show the petitioner company receive letters addressed in every conceivable name and address bearing the name Stark.

These letters, introduced by petitioner, were received by petitioner in due course of business, and were not trumped up or instigated by petitioner, and were introduced simply to show that the public has been confused as to the identity of petitioner and respondents. (Rec., p. 72 *et seq.*)

An inspection of petitioner's other exhibits (P. C. S.), which include advertisements, catalogues, photographs and the like, will show the prominent advertising of petitioner's trade-mark, Stark Trees, petitioner's use of addresses Stark, Starkdale and Stark Station, while W. P. Stark was still with petitioner

company, and W. P. Stark's name and pictures—all published by petitioner, under direction of W. P. Stark, before W. P. Stark opened his rival nursery.

Summing up, a resume of the record surely shows that respondents' entire business was conceived in fraud, and every possible unfair act was deliberately and successfully employed by respondents in undermining petitioner's long enjoyed life and trade-mark.

In fact, the Trial Court, after weighing all of the above evidence, unequivocally found that:

> "There can be no doubt that the defendants for some time prior to the dates on which they severed their actual connection with the complainant company were exploiting their individual names and personalities through the literature of the complainant corporation and otherwise, and were engaging in other activities with the view to setting up a competitive business and of appropriating a portion of the prestige which had been acquired and which was being enjoyed by complainant. Since the establishment of defendants' busines its literature has pointedly aimed at such appropriation of the high reputation of the Stark name in connection with nursery products in Missouri; a reputation acquired by and identified with the complainant in this case. This statement, as well as the ruling of the Court upon the issue of technical trade-mark, is supported and confirmed by the language of defendants themselves taken from their catalogues and advertising matter." (R., p. 188.)

The cause was heard by the United States District Court upon pleadings, proofs, exhibits and arguments by counsel for the respective parties, and thereafter the Court filed an opinion (Rec., p. 186) and a supplemental opinion on settlement of decree (Rec., p. 191), and a decree was entered (Rec., p. 16), decreeing:

> "that the name 'Stark Trees' has been a trade-mark upon fruit trees and nursery products for twenty-five years last past; that on June 24, 1913, said trade-mark was duly registered under the ten-year clause of the Act of Congress of February 20, 1905, in the United States Patent Office, and is a valid and subsisting trade-mark under said Act of Congress.
>
> That the complainant Stark Bros. Nurseries & Orchards Company is, and ever since the year 1891 has been, the exclusive owner of said trade-mark, during all said time has carried on the business at the City of Louisiana in the State of Missouri, of propagating, growing and selling fruit and nursery stock, and during all said time has used upon the boxes and packages containing said fruit trees grown and sold by it a label or stamp bearing the words 'Stark Trees' as a trade-mark.
>
> That the defendants herein, William P. Stark and William H. Stark, Trustees, doing business under the name and style of William P. Stark Nurseries, have infringed upon the said trade-mark, and upon the exclusive rights of the complainant under the same, by selling prior to and since the commencement of this suit fruit trees and nursery stock, to which parcels and packages containing the same said defendants have attached a tag or label bearing in conspicuous printed letters the words, 'Nursery to Orchard. William P. Stark Nurseries, Stark City, Mo.,' together with

the picture of a tree, said name 'Stark' being prominently printed across the picture of the tree, thus plainly suggesting the term 'Stark Trees'; that said label was widely exploited by said defendants in extensive advertising, all in imitation and infringement of the trade-mark 'Stark Trees', as charged in the bill of complaint.

That during a period prior to the actual starting of the nursery now conducted by defendants the complainant had widely featured in its advertising matter the addresses 'Stark, Mo.,' 'Starkdale, Mo.,' and 'Stark Station, Mo.,' all of which was well known to said defendants; that said defendants caused the name of the postoffice of the town of Chester, Missouri, to be changed to Stark City, Missouri, adopted Stark City as an address and extensively advertised said address in their literature and in connection with their business with the intention of misleading the public into the belief that defendants' nursery was that of the original Stark Nursery Company; by such action defendants intended to and did mislead the public, and intended to and did gain an unfair advantage in trade to the injury of the prestige and business of the complainant company.

It is further ordered, adjudged and decreed that by reason of their infringement of said trade-mark 'Stark Trees', and by reason of their wrongful use of the name 'Stark' and the address 'Stark City,' the complainant to recover of the defendants Willitm P. Stark, William H. Stark and the William P. Stark Nurseries all gains and profits which said William P. Stark, William H. Stark and the William P. Stark Nurseries have derived, received or made during the period within which complainant's said trade-mark is shown to have been infringed, beginning with the 11th day of March,

1914, and that said complainant do also recover from said William P. Stark, William H. Stark and the William P. Stark Nurseries any and all damages which complainant has sustained by reason of defendants' infringement and unfair competition from and after the 26th day of August, 1916, on which date complainant gave notice to defendants of the registration of its said trade-mark.

This cause is hereby referred to George A. Neal, Esq., of Kansas City, Missouri, as Master of this court to take and state the accounting of said gains and profits, and to assess such damages and report thereon with all convenient speed, and said defendants are hereby directed and required to attend before said Master by its officers, partners, agents and employes from time to time as required, and to produce before him such books, papers and documents as relate to the matter at issue, and to submit to such oral examination as the Master may require.

Said Master, in the taking of said accounting and ascertaining said damages, may, if he finds it reasonably necessary so to do, employ an expert certified accountant to assist him in taking said accounting and determining said damages, and may further employ a stenographer to take down the evidence, or any part thereof, that may be submitted in this cause, and afterwards transcribe the same, and all reasonable costs and expenses incurred by said Master in the premises shall be taxed as costs against said defendants and recovered as other costs that are authorized to be paid by defendants.

It is further ordered, adjudged and decreed that a perpetual injunction issue out of and under seal of this court enjoining and restraining the defendants William P. Stark and William H. Stark, as

trustees or individually, and the William P. Stark Nurseries, their officers, clerks, attorneys, agents, servants, workmen and all persons claiming or holding under or through them, from the direct or indirect use of the infringing label charged or any colorable imitation of complainant's trade-mark in suit, from putting the word 'Stark' prominently at the top of its labels, or elsewhere in connection with the business of producing, advertising and selling nursery stock, in such manner as will not unmistakably differentiate their goods and advertisements from those of the complainant's, and from using the name or address 'Stark City' upon their labels or tags attached to nursery stock or packages containing the same or from using the address 'Stark City' in advertising their business and wares.

It is further ordered, adjudged and decreed that the complainant recover of the defendants its costs of this action taxed in the sum of_____Dollars."

On appeal of the case the respondents filed eighteen assignments of error (Rec., pp. 18-21).

The Circuit Court of Appeals delivered an opinion in which it agreed with the trial court that respondents were unqualifiedly guilty of infringing petitioner's registered, valid trade-mark and the grossest unfair competition in the use and advertising of the name Stark; and summed up this part of its opinion by saying, "The Court committed no error in granting the injunction * * *" (Rec., p. 203), with directions, however, as to how and in what manner respondents could use the name Stark.

The Court also said:

"But we are of the opinion that there was error in decreeing that Appellee recover all gains and profits which Appellants have derived or received by reason of the infringement of Appellee's trade-mark, beginning March 11, 1914."

"Section 28 of the Trade-Mark Act of February 20, 1905, 33 Sts. 730, par. 9514, U. S. Comp. St. 1916, after prescribing that notice of the registration of the mark be given by affixing on the mark or label the words 'Reg. U. S. Pat. Off.,' which was not done by Appellee, provides: 'And in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice.' As no notice was given by Appellee to Appellants of infringement of the registered trade-mark, although the words required by the statute were not printed on its trade-mark labels, until a few days before the institution of this action, no damages under this Act can be recovered for infringement of the registered trade-mark before that time in this action."

The Court of Appeals also held that

"as the jurisdiction of the court below depended solely on the fact that there was a federal question by reason of the registration of the trade-mark under the Act of Congress, there being no diversity of citizenship, there can be no liability on the charge of unfair competition prior to the notice under the Trade-Mark Act. To entitle one to recover in such a case the unfair competition must be a part of the same transaction, to-wit:

a violation of the Act of Congress, and liability thereunder. It must be an aggravation of the infringement of the registered trade-mark, to give the Court jurisdiction to award damages."

"In the case at bar the unfair competition only became a part of the same transaction as the infringement of the registered trade-mark, after the notice had been given, as Appellee's trade-mark labels had not the words required by the Act of Congress on them—'Reg. U. S. Pat. Off.' Had no notice been given by Appellee it could not have recovered any damages. This was expressly decided by this Court in Rossman v. Garnier, 211 Fed. 401-407, 128 C. C. A. 73-79."

"Gains and profits made before notice was given under the Trade-Mark Act, in the absence of a label bearing the inscription prescribed by the Act of Congress, are independent of the Act of Congress and can only be recovered under the rules established by courts of equity in actions for unfair competition. Such an action cannot be maintained in a national court in the absence of a diversity of citizenship."

The Court further said:

"The decree of the court below will be modified by adding to the injunction clause the words hereinbefore set forth, and that the appellants be charged with gains and profits made by them by reason of the unfair competition arising from the infringement of appellee's registered trade-mark, and the damages, if any, which appellee has sustained by reason thereof since the beginning of the action. The costs of this appeal will be taxed two-thirds to the appellants and one-third to the appellee."

Upon the rulings and decisions of the Court of Appeals, the petitioner filed a petition for rehearing and stated as grounds the reasons that the record abounds with proof that appellants were aware of appellee's rights which were repeatedly asserted, that, notwithstanding, appellee's letter under date of March 11, 1914 (Rec., p. 39) was, as the trial court found, sufficient notice to the appellants under the above quoted section of the statute about constructive notice; that the above referred-to statute simply means that if the owner of a registered trade-mark does not print the notice on the label he cannot recover damages unless he proves not that the infringer was notified of *registration,* but "*of infringement,* and continued the same after *notice.*"

The petition for rehearing was denied without opinion.

THE PROPOSITIONS.

The propositions presented in the petition for certiorari are:

1. That petitioner was satisfied with the decree of the trial court.

2. That the Court of Appeals erred in holding that the letter of March 11, 1914 (Rec., p. 39), was not sufficient notice—even disregarding the fact that respondents positively knew of petitioner's trade-mark and rights even prior to the inception of their infringing use.

3. The Court erred in holding that "the unfair competition only became a part of the same transaction as the infringement of the registered trade-mark, after the notice had been given, as appellee's trade-mark labels had not the words required by the Act of Congress on them—"Reg. U. S. Patent Office."

4. The Court erred in dating the accounting and damages from the date of filing the suit.

5. The Court erred in *not* holding that—in view of the fact that respondents continued infringing and practicing unfair competition after suit was filed, which surely is unquestionable notice—respondents be ordered to account to petitioner all gains and profits from the beginning of the infringement and unfair competition.

THE ARGUMENT.

In view of the fact that the trial court and Court of Appeals were agreed that respondents infringed petitioner's registered, valid trade-mark and were guilty of almost every conceivable method of unfairly using the name Stark to their gain and to petitioner's damage and loss, but came to different conclusions as to the interpretation and intended meaning of Section 28 of the Trade-Mark Act of February 20, 1905, we deem it proper and expedient to argue that phase of the case first.

Section 28 of the Trade-Mark Act of February 20, 1905, 33 Stat. 730, par. 7514, U. S. Comp. St. 1916, states:

> "That it shall be the duty of the registrant to give notice to the public that a trade-mark is registered, either by affixing thereon the words 'Registered in U. S. Patent Office,' or abbreviated thus, 'Reg. U. S. Pat. Off.,' or when, from the character or size of the trade-mark, or from its manner of attachment to the article to which it is appropriated, this can not be done, then by affixing a label containing a like notice to the package or receptacle wherein the article or articles are inclosed; and in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement and continued the same after such notice."

It is admitted that petitioner, following the custom and practice of a great many of the owners of inter-

nationally advertised and used trade-marks, did not put this notice on its labels bearing the registered trade-mark.

The trial court held in its original opinion that "Defendants (respondents) will be required to account to complainant (petitioner) for damages sustained and for profits accruing during the period within which complainant's (petitioner's) trade-mark is shown to have been infringed," and directed a decree prepared accordingly (Rec., p. 191).

Counsel could not agree upon the decree, and in the argument this Sec. 28 of the Trade-Mark Act was set up, whereupon the trial court wrote a Supplemental Memorandum on Settlement of Decree (Rec., p. 191), modifying its original opinion allowing damages and profits during the infringing period (which in fact began with the inception of respondents' business in 1912), and prepared and entered a decree ordering an accounting of profits beginning March 11, 1914, which was the date of a letter of complaint from petitioner to respondents, saying among other things, "we hereby notify you to discontinue the unfair competition and infringement on our rights" (Rec., p. 39).

The Court further said:

> "Again, January 15, 1916, a letter of the same general purport was written by complainant (petitioner) to defendants' (respondents') known attorney. Early in 1916 the matter was taken up with the Federal Trade Commission. Formal notice was again sent in August, 1916, and Mr. E. W. Stark testifies that he wrote other letters and

made other demands intermediately to the same effect. I cannot escape the conclusion that, throughout this period complainant was reiterating its objection to the action of defendants, and that defendants were well aware of the substance of its complaint. Such being the case, I find no such waiver, abandonment or laches as would preclude complainant from substantial recovery, if the same can be made to appear upon accounting."

The trial court limited the petitioner to *damages*, "as distinguished from profits, to the period beginning with the date of this formal notice, to-wit, August 26, 1916," which was a formal letter of specific protest against the infringement and unfair competition, written by petitioner's attorney on August 26, 1916.

The Court of Appeals "decreed that the appellants (respondents) be charged with the gains and profits made by them by reason of the unfair competition arising from the infringement of appellee's (petitioner's) registered trade-mark, and the damages, if any, which appellee has sustained by reason thereof since the beginning of this action."

The beginning of this action was on September 11, 1916, and the formal notice of infringement and threatened suit was sent by registered mail August 26, 1916, about two weeks earlier, but no reply was received.

The Court of Appeals evidently arrived at the date of September 11, 1916, from which to date the accounting and possible damages, because it deemed the date of the formal notice of August 26, 1916, and the

date of filing the suit, September 11, 1916, as being practically simultaneous.

The Court of Appeals seems to have interpreted Section 28 of the Trade-Mark Act as meaning that in the absence of the constructive notice, "Reg. U. S. Pat. Off," on the labels the infringer must be notified of infringement of the *registered* trade-mark, in order to recover damages. What the statute does say is that " • • • in any suit for infringement by a party failing *so* to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of *infringement* and continued the same after such notice."

Doubtless this statute was enacted to protect innocent infringers and not deliberate infringers, such as respondents, who positively not only knew of the rights of petitioner, even before they started their concern in 1912, but used every conceivable effort and means to encroach upon petitioner's trade-mark and business.

The Court says that, "Had no notice been given by appellee, it could not have recovered any damages. This was expressly decided by this Court in Rossman v. Garnier, 211 Fed. 401, 407, 128 C. C. A. 73-79." (Rec., p. 204.)

The above remark may or may not be applicable, but, be it as it may, the trial court in comparing the facts of the above case and the present one, said:

> "In Rossman v. Garnier (C. C. A.), 211 Fed. 401, it did not appear that 'in the use of the trade-mark the appellee ever complied with the

requirement that she give notice to the public by affixing thereto the words 'Registered in U. S. Patent Office,' or 'Reg. U. S. Pat. Off.,' nor on a separate label, nor is there any evidence that any notice was ever given appellee of the infringement.

" 'It follows that no damages can be recovered and no use would be subserved by an accounting.'

"In this (Stark) case it must be kept in mind that it has been adjudged that defendants (respondents) with full knowledge of complainant's (petitioner's) rights, the history of its business, the marks employed by it, and the fact that the name of 'Stark' had become practically a trademark in nursery matters, nevertheless deliberately and premeditatedly sought to draw to themselves the benefit and advantage of complainant's prestige and repute. Such a situation differs radically from one in which an infringement, although found to exist, is unaccompanied by a concious and willful purpose. In the latter case the demand for notice and warning is recognized as an appropriate and equitable condition to the right to exact what Judge Haight has characterized as a 'punitive addition to the ordinary decree of compensatory damages'." (Rec., p. 193.)

This case (Rossman v. Garnier, *supra*) is in so far as we have been able to find, the only one in the reports treating directly Section 28 about notice; but we contend that this case is of no real benefit to respondents' cause, as the infringer was innocent. We do feel, however, that it is a case in favor of petitioner, for the Court implied that had appellee had notice, constructive or actual, of the *infringement* an accounting would have followed.

We also contend that since the facts of the present case positively show that respondents were conscious and willful infringers and unfair traders from the very day in 1912 when their competing concern was started, from a purely equitable viewpoint the statute about constructive notice, which was enacted to protect innocent infringers, is immaterial in this case, and that petitioner should be allowed profits and damages from the beginning of respondents' infringement and unfair competition.

As was said by this Court in Hamilton-Brown Shoe Co. v. Wolf Bros. & Co. (36 Sup. Ct. Rep. 269):

> "In this country, it is generally held that in a proper case both damages and profits may be awarded."

It is merely conjectural on our part as to what the facts would have to be to constitute a "proper case," but, after a careful perusal of many cases of trademark infringement and unfair competition and finding none to compare with this case in point of premeditated and deliberate encroachment, we sincerely believe that the facts of this case justify us in contending that nowhere in the books can a single case be found, which even approaches as nearly as this a "proper case" in which both an accounting and damages from the beginning of the encroachment would equitably reimburse petitioner the financial loss sustained by reason of the respondents' systematic, deliberate and malicious infringement and unfair competition inseparably connected with the infringement.

As this Court said in Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., *supra*:

> "The infringer is required in equity to account for and yield up his gains to the true owner, upon a principal analogous to that which charges a trustee with the profits acquired by wrongful use of the property of the *cestui que trust.*"

Petitioner contends that, under the circumstances surounding this case, respondents should be compelled to account to petitioner all gains and profits which would probably only partially compensate petitioner the financial loss doubtless attributable to respondents' overwhelming infringement and unfair competition. It is no excuse if respondents complain that some of their business was secured by virtue of the intrinsic value of their trees, if we are to apply the reasoning on this question in Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., *supra*, where it is said:

> "The difficulty lies in ascertaining what proportion of the profit is due to the trade-mark, and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable certainty, it is more consonant with reason and justice that the owner of the trade-mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another, so that they cannot be distinguished and separated, he shall lose the whole, for the reason that the fault is his; and it is but just that he should suffer the loss rather than an innocent party, who in no degree contributed to the wrong."

In this connection it is a significant fact that petitioner's mail order sales were $387,348 less the four years immediately after respondents' competition than the preceding four years (Rec., p. 50), in spite of the fact that during the like period petitioner's advertising expenditures were increased (Rec., p. 27).

When petitioner filed its bill it was of the impression that even an accounting of respondent's entire profits would not compensate it the loss of business and usual profits directly attributable to the terrific infringement and unfair competition of respondents, so in order to attempt to secure proper retribution in the event of a favorable finding asked for an accounting of profits and damages, and that damages be tripled, under Section 16 of the Trade-Mark Act of 1905, which reads:

> "That the registration of a trade-mark under the provisions of this act shall be prima facie evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and

> whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs."

Since it is believed that the only practical method yet developed of ascertaining damages in a trademark case is by an accounting of profits made by the infringer during the infringing period, petitioner has every reason to believe that an accounting of respondents' profits from even the inception of their business would be a great deal less than one-third of petitioner's loss of profits by virtue of petitioner's $387,340 loss of mail order sales. Under this assumption and "according to the circumstances of the case" (Sec. 16 *supra*), petitioner feels justified in asking for and expecting triple damages under the statute.

While if the Court of Appeals' interpretation of Section 28 and decree ordering profits and damages from the beginning of the suit prevail, petitioner would hardly receive sufficient money damages to pay even the one-third taxation of costs (which we feel is inequitable) assessed against petitioner as appellee in the Court of Appeals, as the record shows (p. 139) that respondents ceased using their infringing labels within a few months after suit was begun, although the trial court remarked in its supplemental memorandum upon settlement of decree (Rec., p. 194), that new evidence had been adduced showing that the address "Stark City" which was used in con-

nection with the trade-mark infringement and advertising, was "still being employed for the purpose of appropriating to the product of defendants (respondents) that advantage of origin peculiar to the Stark name, which has been found to be a property right of complainant (petitioner)", as late as February 26, 1918, some eighteen months after suit was instituted.

IN CONCLUSION.

Petitioner respectfully submits that its name Stark Trees is a valid, registered trade-mark under the ten-year proviso of the Trade-Mark Act of 1905; that respondents not only knowingly and wilfully infringed this technical trade-mark from the very inception of their competing nursery, but so unfairly used the name Stark and Stark City in conjunction with the trade-mark infringement as to be guilty of unfair methods of competition which are inseparable from the infringement; that these many inseparable acts of unfair competition should be disposed of under the general equity rule of disposing of the whole matter; that Section 28 of the Trade-Mark Act of 1905, about constructive notice was not enacted to protect deliberate infringers and unfair traders such as respondents were unqualifedly agreed by the trial court and Court of Appeals to be, and therefore equity should demand that respondents be made to account to petitioner all gains and profits during the entire infringing period and triple damages under Section 16 of the Trade-Mark Act if petitioner is to be even partially compensated the loss it suffered by the single reason of respondents' wilful and premeditated infringement and unfair competition inextricably and inseparably related to the infringement.

Respectfully submitted,

ANDREW B. REMICK,
Counsel for Petitioner.

JAN 20 1921
JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 171

STARK BROS. NURSERIES & ORCHARDS COMPANY,

Petitioner,

vs.

WILLIAM P. STARK and WILLIAM H. STARK, Trustees, Doing Business under Name and Style of William P. Stark Nurseries,

Respondents.

Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF AND ARGUMENT FOR PETITIONER

ANDREW B. REMICK,
Counsel for Petitioner.

Skeen Brief Printing Company, St. Louis.

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REPLY BRIEF AND ARGUMENT FOR PETITIONER

The respondents in their brief and argument in this court, by implication from their silence, agree with the

findings of the trial court and the Court of Appeals that they were guilty of trade-mark infringement and unfair competition. Respondents, who were adjudged to be willful and determined wrongdoers, now seek to hide behind Section 28 about constructive notice, with the view of being allowed to keep their ill-gotten gains at the costly expense of petitioner.

Replying briefly to respondents' discussion on page 17 of their brief about W. P. Stark's grievances against petitioner, we respectfully direct the Court to page 33 of the record, and to letters printed in full on pages 145 and 147 of the record, about a "round-up" and "sticking the goad" into respondents. The matters discussed on pages 17-18-19-20 of respondents' brief were observed and passed over by the trial judge who, after careful deliberation and consideration, remarked about these suits and controversies between the parties in 1913 and 1914:

> "Suits were instituted, the issues in which did not directly involve this trade-mark, and the settlement reached concerned only those issues and constituted in no sense a waiver of the rights asserted." (Rec., p. 193.)

We wish here to contradict respondents' inaccurate statement on page 20, that "The record discloses that after petitioner's letter to respondent, August 16, 1916, defendant did discontinue the use of the trade-mark labels except, possibly, in a few cases, when the tags were inadvertently used," by quoting from the trial court, which found, "there is some evidence, however, that the shipping label has been employed since the

period of such claimed abandonment." Then Mrs. Blair testified (Rec., p. 67) that on November 28, 1916, she received trees from respondents bearing the infringing label—over two months after suit was filed and over three months after the formal notice; and Respondent Wm. P. Stark himself testified that respondents used the remnants of the infringing labels until the new form of label was adopted, as shown in their catalog of 1917 (Rec., p. 139).

Respondents' assertion on page 23 of their brief that this suit was "prompted by jealousy rather than a purpose to redress a wrong," seems to us absurd in light of the systematic, malicious attack by respondents on the marks, expensively acquired good-will and reputation of petitioner, as disclosed by even a cursory review of the record.

A perusal of the bill of complaint will show that respondents' statement on page 24, that there is no prayer in the bill concerning unfair competition, is without foundation; as is the statement that "the wrongful acts charged in connection with unfair competition were *all prior* to the registration of the trademark in controversy, which is dated June 24, 1913, and, therefore, could not be considered as 'inseparably' connected with it," for the record discloses, time and again, that respondents were guilty of the unfair competition as charged up until the time suit was started in September, 1916, and the trial court found from evidence adduced after the hearing, that one of the most serious acts of unfair competition was deliberately persisted in as late as February 26, 1918 (Rec., p. 194).

Respondents' argument on pages 24-32, boiled down, it seems to us, admits our contention that a federal court has jurisdiction over unfair competition inseparably connected and inextricably intertwined with infringement of a valid registered trade-mark or, by analogy, a patent, in a suit between parties of the same State, but contends that petitioner's registered trade-mark is not valid in so far as damages or accounting of profits are concerned until petitioner complied with the rule of Section 28 of the Trade-Mark Act of giving constructive notice by marking "Registered in U. S. Patent Office" or the abbreviation, "Reg. U. S. Pat Off.," or actual notice of the registration.

We repeat our contention that this section of the statute about notice has no application to this case, as it is admitted and adjudicated that respondents here were not innocent infringers, but on the contrary were deliberate, malicious and systematic infringers and unfair traders.

If respondents are finally allowed to hide behind Section 28 and are made to pay the accounting and damages only during the few months of admitted infringement after suit was filed in September, 1916, the very Trade-Mark Act which doubtless was enacted to protect and promote trade will become an instrument to enable the guilty respondents to keep gains unfairly secured, which we protest would be not only unconscionable but a bad precedent.

We admit that if respondents were not proved to be such deliberate, malicious and systematic wrongdoers there might be some weight to an argument on their

part that an accounitng or damages should not lie prior to June 24, 1913, when the mark in controversy was registered and jurisdiction of the federal court followed. In this regard reference to the record (p. 99) will show that respondents were just beginning to sell their product under the infringing mark about the date of petitioner's trade-mark registration, so petitioner's contention here and elsewhere that respondents be made to account and pay prior to the date of the registration is not made with any hope of additional monetary reward, but is made to conform to what it believes is consonant with equity.

We do not agree with respondents' unsubstantiated statement on page 34, that,

> "It is admitted that the notice required by the federal statute was not given until the filing of this suit, or possibly a few days before. Therefore, since there could be no infringement of trade-mark prior to that time under the decision of this court and the federal courts throughout the country, the question of an accounting for gains and profits as to unfair competition could not ante-date the notice of the infringement of the trade-mark."

In the first place we have contended and continue to contend that Section 28, about constructive notice, has no equitable application or relation to this case, as it has been proved almost to the point of admission that respondents were deliberate, willful and premeditated infringers and unfair traders. Even the principal respondent, Wm. P. Stark, testified (Rec.,

p. 93) that petitioner company used the trade-mark, Stark Trees, of the design as shown in the certificate of registration, as early as 1893.

In the second place, that part of the above quotation from respondents' brief saying " • • • under the decision(s) of • • • the federal courts throughout the country • • • ," is unsupported by any cited cases or authorities, and, therefore should, in our opinion, be either ignored or treated as a self-serving statement probably written in exasperation at their failure to find a single case in point.

The remainder of respondents' brief, pages 34-39, we believe is ably and succinctly answered by the words of Judge Van Valkenburgh in the trial court:

> "The doctrine announced in McLean v. Fleming, 96 U. S. 245, and Menendez v. Holt, 128 U. S. 574, is well established and has been restated in many federal decisions. Briefly stated, it is:
>
> 'Unreasonable delay in bringing a suit is always a serious objection to relief in equity; but cases arise in litigations of the kind before the court where the complainant may be entitled to an injunction to restrain the future use of a trade-mark, even when it becomes the duty of the court to deny the prayer of the bill of complaint for an account of past gains and profits.'
>
> The reason for the rule is well stated by the Supreme Court in a number of cases. Thus, in Townsend v. Vanderwerker, 160 U. S. 171:
>
> 'The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause

of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did.'

And still more fully in Galliher v. Cadwell, 145 U. S. 368:

'The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them. • • •

They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or parties.'

It will be noted, therefore, that each case presented depends upon its own peculiar facts, and that mere delay in asserting legal rights is not a bar; there must have been such change in condition or relations, such reasonable ground to rely upon waiver or abandonment—in short, the intervention of some element in the case which would cause the delayed assertion of these rights

to work injustice. A number of cases are cited in which, after a delay of six or more years, the injunction was granted but accounting denied. None of these cases are, of course, persuasive against the granting of the injunction prayed, nor are they at all determinative of the right to an accounting. The case of Rubber, etc., v. Devoe et al., 233 Fed. 150-160, is a case not of trade-mark, but of unfair trade. In it damages were awarded; the accounting for profits was denied because the court could not find that the unfair competition was so willful and fraudulent as to justify the imposition of profits. This is the extent of the application, if any, of the opinion in Hamilton-Brown Shoe Company v. Wolf Brothers, 240 U. S. 251. (Petitioner's Note: Judge Van Valkenburgh, the trial judge in this Stark case, wrote the opinion of the Court of Appeals in the Hamilton-Brown case.) In Rossman v. Garnier (C. C. A.), 211 Fed. 401, it did not appear that—

'In the use of the trade-mark the appellee never complied with the requirements that she give notice to the public by affixing thereto the words "Registered in U. S. Patent Office," or "Reg. U. S. Pat. Off.," nor on a separate label, nor is there any evidence that any notice was ever given appellee of the infringement.'

'It follows that no damages can be recovered and no use would be subserved by an accounting.'

In this case it must be kept in mind that it has been adjudged that the defendants, with full knowledge of complainant's rights, the history of its business, the marks employed by it, and the fact that the name "Stark" had become practically a trade-mark in nursery matters, nevertheless deliberately and premeditatedly sought to

draw to themselves the benefit and advantage of complainant's prestige and repute. Such a situation differs radically from one in which an infringement, although found to exist, is unaccompanied by a conscious and willful purpose. In the latter case the demand for notice and warning is recognized as an appropriate and equitable condition to the right to exact what Judge Haight has characterized as a 'punitive addition to the ordinary decree of compensatory damages.'

But in the record before us, which, at the earnest solicitation of counsel, I have again examined more in detail upon this point, it abundantly appears that defendants not only were consciously encroaching upon complainant's rights, as I have said, but also that complainant resented and seriously objected thereto. It may be true that prior to August 26, 1916, a formal and technical notice had not been served which dealt with this trade-mark in specific terms, but litigation started between these parties as early as 1913, extending to the fall of 1914. Suits were instituted, the issues in which did not directly involve this trade-mark, and the settlement reached concerned only those issues and constituted in no sense a waiver of the rights asserted. Confusion of mail, growing out of the Stark City address, was referred to the Postmaster General, through the Attorney General for that Department, and an award was made, in some measure in favor of complainant. The use of the Stark name runs through all the differences disclosed as the gist of the controversy. On or about March 11th, 1914, the president of complainant wrote to the defendant William P. Stark that

'We would have to take drastic action if his unfair methods and misleading statements did not cease.'

'We hereby notify you to discontinue their unfair competition and infringement on our rights.'

Again, January 15, 1916, a letter of the same general purport was written by complainant to defendants' known attorneys. Early in 1916 the matter was taken up with the Federal Trade Commission. Formal notice was again sent in August, 1916, and Mr. E. W. Stark testifies that he wrote other letters and made other demands intermediately to the same effect. I cannot escape the conclusion that, throughout this period, complainant was reiterating its objection to the action of defendants, and that defendants were well aware of the substance of its complaint. Such being the case, I find no such waiver, abandonment or laches as would preclude complainant from substantial recovery, if the same can be made to appear upon accounting."

IN CONCLUSION.

Considering the fact that every allegation of the bill of complaint (which probably is the most comprehensive one ever filed in point of premeditated, systematic and resultful infringment and unfair competition) was proved to the complete satisfaction of the trial court and unqualifiedly affirmed by the Court of Appeals, we are reluctant to believe that even the broadest principles of equity could conscionably deny petitioner substantial relief and thereby allow the guilty respondents, who profited by their wrongdoing, to keep what is not rightfully theirs, simply because petitioner did not give constructive notice, in face of the fact that it has been adjudged and admitted that respondents not only were as familiar with petitioner's trade-mark use and business, but in the words of the trial court respondents "pointedly aimed at such appropriation of the high reputation of the Stark name in connection with nursery products in Missouri; a reputation acquired by and identified with the complainant in this case."

Respectfully submitted,

ANDREW B. REMICK,
Counsel for Petitioner.

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

STARK BROS. NURSERIES & ORCHARDS COMPANY,
Petitioner,

vs.

WILLIAM P. STARK and WILLIAM H. STARK, Trustees, doing business under name and style of William P. Stark Nurseries,
Respondents.

No. 171.

Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT FOR THE RESPONDENTS.

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Respondents.

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Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT FOR THE RESPONDENTS.

PREFACE.

This suit was instituted in the United States District Court for the Southwestern Division of the Western District of Missouri on the 11th day of September, 1916, and tried the latter part of 1917. On

January 30, 1918, the District Judge filed a memorandum, set forth in transcript of the record, pages 186 to 191, and February 26, 1918, he filed a supplemental memorandum on the settlement of decree (Tr. of Rec., pp. 191 to 195).

The decree of the District Court was for the plaintiff, and defendants appealed to the United States Circuit Court of Appeals of the Eighth Circuit. The case is reported in 257 Fed. 9. Preceding the opinion of the Circuit Court of Appeals is a statement by that Court, of the issues, as follows:

Statement of Issues by Circuit Court of Appeals.

"The appellee instituted this action to enjoin the appellants from infringing its registered trade-mark, and from unfair competition, with the usual prayer for damages and an accounting for profits. The appellee is a corporation existing under the laws of the State of Missouri, and the appellants, defendants in the court below, are citizens of the same State; the jurisdiction of the Court having been invoked upon the sole ground of the registration of the trade-mark under the Act of Congress of February 20, 1905, and the amendments thereto (Comp. St., Sections 9485, 9487-9511, 9513-9516).

"The complaint charges that the plaintiff now is, and has been since the year 1816, including its predecessors, James Stark, William Stark, Stark & Barnett, Stark & Co., and Stark Bros.

Nurseries Company, engaged in the business of propagating, buying and selling fruit trees and other nursery stock, and ever since 1893 marked them with the words 'Stark Trees' as its trade-mark, affixing it to boxes or packages containing its product; that it has incurred great expense in propagating trees and advertising them as 'Stark Trees' and that this trade-mark has become widely know in this and many foreign countries, as indicating a superior grade of trees propagated and sold by the plaintiff and its predecessors; that its fruit trees are invariably bought and sold and commonly designated as 'Stark Trees'; that on January 9, 1913, it filed in the United States Patent Office an application for registration of its said trade-mark 'Stark Trees' in accordance with the Act of Congress of February 20, 1905, and its amendment, and on June 24, 1913, it was duly registered in the United States Patent Office as registration No. 92,282; that it claims exclusive right to the trade-mark 'Stark Trees' or the word 'Stark' on fruit and ornamental trees, the trade-mark which has always been claimed by its predecessors, they being the first to adopt this mark for nursery stock; that in the spring of 1913 they found sales of fruit trees labeled and marked with the words 'William P. Stark Nurseries', said words being printed across the representation of a short, bushy tree, so arranged that the word 'Stark' appeared in large prominent letters across the figure of the tree, and the other words in comparatively smaller type, which, upon investigation, it was found was marked and

sold by the defendants; that defendants well knew of the exclusive use claimed by plaintiff of the trade-mark 'Stark Trees' or any simulation thereof, and that they used the trade-mark 'Stark' in conjunction with the representation of a tree, with the intent to defraud, to deceive and have caused their stock to be bought as and for the nursery stock of the plaintiff, much to plaintiff's loss and injury to the public, and the infringement of plaintiff's registered trade-mark, and of its trade-mark rights, under the law; that defendants were duly notified of their infringement, but continued to do so since then; that William P. Stark, one of the defendants, was for a number of years an employe, officer and stockholder of plaintiff, during which time he attempted to and did familiarize his personal name to readers of the plaintiff's general advertising; that defendants in 1912 established a nursery business, with the principal office at Louisiana, Missouri, the home of plaintiff and its predecessors, causing a confusion of mails, which ceased when, by order of the Postmaster General, all mail addressed to the name of 'Stark' should be delivered to the plaintiff, whereupon the defendants moved their nurseries to Chester, Missouri, and caused the name of the town and post office of Chester to be changed to 'Stark City', in the face of the fact that for years prior thereto the plaintiff had extensively advertised its addresses at 'Stark', Starkdale' and 'Stark Station', Missouri; that all the offices of the defendants were at Neosho, Missouri, about ten miles from Stark

City, while all their advertising prominently bears the address 'Stark City', causing much annoyance and confusion to the plaintiff; that defendants in their extensive advertising dwelt upon the fact that the name 'Stark' had for nearly a century been associated with the nursery business of America, and that for the last quarter of a century the defendant William P. Stark has made the name a sort of a trade-mark in big things in nursery work, and that their nursery at Stark City would continue to broaden the 'Stark' nursery business; that the business of plaintiff and its reputation and the name of 'Stark Trees' had been built up at great labor and expense, employing 5,000 salesmen.

"The defendants in their answer deny most of the material allegations and state that the first notification of the claim of the plaintiff to the trade-mark was in a letter received from it dated August 26, 1916, many years after they had used the name 'Stark' in connection with their business and deny that they had any knowledge of appellee's claim to the exclusive right to the use of a trade-mark 'Stark Trees' until notified by that letter. They deny any intent to defraud, or that appellee has suffered any loss by reason of their acts. They deny that the exclusive right to the trade-mark 'Stark Trees', or the word 'Stark' on fruit and ornamental trees, has been and is now claimed by plaintiff and its predecessors, or that plaintiff and its predecessors were the first to adopt and use this trade-mark for nursery stock, and, if it did, they had no knowl-

edge of it until they received the letter of August 26, 1916. They deny that, at the time the name of Chester was changed to Stark City, plaintiff was using the address 'Stark', 'Starkdale' or 'Stark Station', Missouri; that for years prior thereto it had not used any of these names, nor had there ever been a post office named 'Stark', 'Starkdale' or 'Stark Station', Missouri. They admit that they had advertised the location of their nurseries at Stark City, where they are, in fact, located, and their offices at Neosho, Missouri, and that the defendant, William P. Stark, had for over a quarter of a century been associated with plaintiff's nursery work. They claim that there can be no confusion, as all their sales are made by catalogs, and advertisements, and none by traveling salesmen, while the plaintiff did most, if not all, of its business through traveling salesmen, and emphasized in its advertisements that it was located at Louisiana, Missouri, while defendants, in all their advertisements and catalogs, emphasized the location of their nurseries at Stark City; that in all their advertisements, letters and catalogs they had taken precautions to refrain from disparaging the plaintiff or its products, and that their competition had been fair and open.

"Upon final hearing there was a decree in favor of the plaintiff, enjoining defendants from the direct or indirect use of the infringing label, or any colorable imitation of plaintiff's trademark in suit, and from putting the word 'Stark' prominently at the top of its label or elsewhere,

in connection with the business of producing, advertising and selling nursery stock, in such manner as will not unmistakably differentiate their goods from those of the complainant, and from using the name or address of 'Stark City' upon their labels or tags attached to nursery stock, or packages containing same, or from using the address 'Stark City' in advertising their business. The decree also directed a reference to a special master to determine all gains and profits which the defendants had derived by infringing on plaintiff's trade-mark, beginning with the 11th day of March, 1914, and that the plaintiff also recover from the defendants all damages which it has sustained by reason of the defendants' infringement and unfair competition from and after the 26th day of August, 1916, on which date plaintiff gave notice to defendant of the registration of its said trade-mark (248 Fed. 154). To reverse this decree appellants are prosecuting this appeal."

Modification of Decree of District Court by United States Court of Appeals.

The United States Court of Appeals modified the decree of the District Court as to the use of surname Stark and also as to the beginning of the date of accounting of gains and profits. The plaintiff felt aggrieved by this modification and applied to the United States Supreme Court for a writ of certiorari to the United States Court of Appeals, to have this Court

review that part of the decision of the United States Court of Appeals relating to an accounting for gains and profits. The portion of the opinion of the Court of Appeals modifying the rulings of the District Court is found, 257 Fed., l. c. 14-17, as follows:

> "The Court committed no error in granting the injunction, but, in order to avoid any misapprehension, there should be added to that part of the decree granting the perpetual injunction the following words:
>
> > 'That the defendants may use their surnames in circulars, catalogues, or advertisements, but they must be accompanied by information that they are not of the original William Stark Nurseries, nor in anywise connected with the Stark Bros. Nurseries and Orchards Company, or any of its predecessors under whatsoever name their business was conducted, and that their trees are not the product of any of these concerns, nor their successors. It is further ordered and decreed that for the purpose of distinguishing defendants' trees from those of the complainant, the defendants shall insert in their circulars, catalogues and advertisements a notice substantially as follows, and in form as conspicuous as the body of such circulars, catalogues or advertisements:

"Notice.

"The 'Stark Trees' have been the product of the nursery business of the Stark family since the year 1816, and this nursery is still carried on by successors of the original Stark family at Louisiana, Missouri; that William P. Stark is a member of that family and was connected for over twenty-five years with, and learned the business from, successors of the original Starks; that our business is conducted at Neosho, Missouri, and has no connection whatever with the nursery business of the Stark Bros. Nurseries and Orchards Company, at Louisiana, Missouri." ' "

But we are of the opinion that there was error in decreeing that appellee recover all gains and profits which appellants have derived or received by reason of the infringement of appellee's trade-mark, beginning March 11, 1914.

Section 28 of the Trade-mark Act of February 20, 1905, 33 Stat. 730 (Section 9514, U. S. Comp. St. 1916), after prescribing that notice of the registration of the mark be given by affixing on the mark or label the words "Reg. U. S. Pat. Off.", which was not done by appellee, provides:

> "And in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice."

As no notice was given by appellee to appellants of infringement of the registered trade-mark, although the words required by the statute were not printed on its trade-mark labels, until a few days before the institution of this action, no damages under this act can be recovered for an infringement of the registered trade-mark before that time in this action. The trial court in its decree limited the damages for infringing the trade-mark to that time, but as to the gains and profits held that the appellants are chargeable for unfair competition from March 11, 1914, when appellee had first complained that appellants' advertising matter constituted unfair competition.

As the jurisdiction of the court below depended solely on the fact that there was a federal question by reason of the registration of the trade-mark under the Act of Congress, there being no diversity of citizenship, there can be no liability on the charge of unfair competition prior to the notice under the Trade-Mark Act. To entitle one to recover in such a case, the unfair competition must be a part of the same transaction, to wit, a violation of the Act of Congress and liability thereunder. It must be an aggravation of the infringement of the registered trade-mark, to give the court jurisdiction to award damages (A. Leschen Co. v. Bascom Co., 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710; Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446, 460, 31

Sup. Ct. 456, 55 L. Ed. 536; T. B. Wood's Sons Co. v. Valley Iron Works [C. C.], 166 Fed. 770; Ross v. H. S. Geer Co. [C. C.], 188 Fed. 731, 734; Electric Boat Co. v. Lake Torpedo Boat Co. [D. C.], 215 Fed. 377; Planten v. Gedney, 224 Fed. 382, 386, 140 C. C. A. 68, 72; U. S. Bolt Co. v. Kroncke Hardware Co., 234 Fed. 868, 148 C. C. A. 466; Mallinson v. Ryan [D. C.], 242 Fed. 951).

In the case at bar the unfair competition only became a part of the same transaction as the infringement of the registered trade-mark, after the notice had been given, as appellee's trade-mark labels had not the words required by the Act of Congress on them: "Reg. U. S. Patent Office." Had no notice been given by appellee, it could not have recovered any damages. This was expressly decided by this court in Rossman v. Gardner, 211 Fed. 401, 128 C. C. A. 73, 79.

None of the authorities relied on by counsel for appellee is in point. In Jacoway v. Young, 228 Fed. 630, 143 C. C. A. 152, the infringed trade-mark label had printed on it the words "Registered U. S. Patent Office", therefore that was notice. Ludwigs v. Payson Mfg. Co., 206 Fed. 60, 124 C. C. A. 194, and Detroit Show Case Co. v. Kawneer Mfg. Co., 250 Fed. 235, 162 C. C. A. 730, were actions for infringement of patents, and it was held that a claim for unfair

competition in connection with the sale of the infringing article may properly be joined. But see Geneva Furniture Co. v. Karpen, 238 U. S. 254, 259, 35 Sup. Ct. 788, 59 L. Ed. 1295. Shrauger & Johnson v. Phillip Barnard Co. (D. C.), 240 Fed. 131, decided by Judge Wade, not only fails to sustain counsel's contention, but is an authority to the contrary. While Judge Wade makes the statement quoted by counsel for appellee, he proceeds:

> "In certain cases, where there was combined the charge of infringement, and also unfair competition, courts have held that, even though the claim of infringement was decided in favor of the defendant, the court still could retain jurisdiction upon the question of unfair competition; but the large majority of the cases are the other way."

After reviewing a large number of authorities, he holds:

> "If a bill presented two separate counts, stating two separate and independent causes of action, one for a patent infringement, and the other for unfair competition, entirely independent of the infringement, I should hold that the cause of action for unfair competition should be stricken out. The court has no such jurisdiction conferred by statute, and the rule contended for relates rather to the practice of a court of equity, than it does to the jurisdiction of the court."

When the case was at a later day finally heard before Judge Reed, he sustained a motion to dismiss the petition as to the claim for infringing the plaintiff's alleged trade-mark, and for unfair competition for want of jurisdiction (247 Fed. 547, 550).

Gains and profits made before notice was given under the Trade-Mark Act, in the absence of a label bearing the inscription prescribed by the Act of Congress, are independent of the Act of Congress, and can only be recovered under the rules established by courts of equity in actions for unfair competition. Such an action cannot be maintained in a national court in the absence of a diversity of citizenship. As was held in Standard Paint Co. v. Trinidad Asphalt Co., supra:

> "The opposite parties to the suit are citizens of different States, and while this diversity of citizenship was not necessary to give the Circuit Court jurisdiction of the case in so far as it involved the validity of the trade-mark, it was necessary to give the court jurisdiction of the issue of unfair competition."

Other questions have been discussed by counsel, and have received our careful consideration, but we do not deem it necessary to pass on them in this cause.

The decree of the court below will be modified, by adding to the injunction clause the words hereinbe-

fore set forth, and that the appellants be charged with the gains and profits made by them by reason of the unfair competition arising from the infringement of appellee's registered trade-mark, and the damages, if any, which appellee has sustained by reason thereof since the beginning of this action.

The costs of this appeal will be taxed, two-thirds to the appellants and one-third to the appellee."

Proposition of Law.

The only proposition of law before this Court is whether or not the United States Court of Appeals erred in modifying the decree of the District Court with reference to the time when the accounting of petitioner for gains and profits begins. The United States Court of Appeals decided that the time of beginning of such accounting was the filing of this suit in the District Court, and based its decision upon the finding of the trial court, as well as the Court of Appeals; that no notice was given to the defendant by the plaintiff of the infringement of a trade-mark until shortly prior to the filing of this suit, which notice was only given by a letter written by the attorney for plaintiff to defendant so that the real time of the notice began with the filing of this suit, September 11, 1916.

ARGUMENT.

Petitioners admit that it did not place the notice on its trade-mark label "Stark Trees" in compliance with the provision of Section 28 of the Trade-Mark Act of February 20, 1905, 33 Statute 730, paragraph 7514, U. S. Comp. St. 1916, requiring "That it should be the duty of the registrant to give notice to the public that a trade-mark is registered, either by affixing thereon the words 'Registered in the United States Patent Office' or abbreviate thus, 'Reg. U. S. Pat. Off.', or where from the character or size of the trade-mark or from its manner of attachment to the article to which it is appropriated, this cannot be done, then by affixing a label containing a like notice to the package or receptacle wherein the article or articles are enclosed; and in any suit for infringement by a party failing so to give notice of registration, no damages shall be recovered except on proof that the defendant was duly notified of infringement and continued the same after such notice."

Petitioner contends that the defendants were notified of infringement of the trade-mark in question by a letter written by plaintiff to defendant, March 11, 1914. This letter is as follows (Tr. of Rec., p. 39):

"March 11, 1914.

William P. Stark Nurseries,
Neosho, Mo.

Attention of Wm. P. Stark.

Gentlemen:

The literature and advertising matter that you have recently sent to the officials of this Company, concerning certain claims relative to Delicious Apple and other matters, misstate the facts and constitute unfair competition and are for infringements on the rights of Stark Bros. Nurseries & Orchards Company. We hereby notify you to discontinue the unfair competition and infringement on our rights.

Very truly yours,

Stark Bros. N. & O. Co.,
By E. W. Stark, President."

It is clear that the gravamen of complaint in this letter was the Delicious Apple. In order to appreciate the place which the Delicious Apple occupied in this litigation it is necessary to briefly review the history of the relation of these parties for a short period of time prior to the date of the aforesaid letter of March 11, 1914.

The transcript of record discloses that defendant W. P. Stark is a brother of E. W. Stark, president of plaintiff corporation; that at the time this suit was instituted defendant W. P. Stark owned 30 per cent of the capital stock of plaintiff corporation, E. W. Stark 30 per cent, and the estate of another

brother 30 per cent; that friction arose between E. W Stark, president of plaintiff corporation, and defendant W. P. Stark in 1911; that W. P. Stark for a number of years had been treasurer and general manager of plaintiff corporation; that this friction between E. W. Stark and W. P. Stark became so intense that E. W. Stark intercepted a check for $35,000 and took the same out of the United States mail after it had been deposited in the post office by W. P. Stark as treasurer of plaintiff company; that this check had been sent by W. P. Stark in his official capacity to pay a note of plaintiff then due at a St. Louis bank (Tr. of Rec., p. 98); that W. P. Stark left the company for a short time, but returned to the company in the fall of 1911; that shortly thereafter W. P. Stark, as treasurer and general manager of the company, was interfered with in the discharge of his official duties to such an extent that he was practically eliminated as an officer of the company, and that at the annual meeting of the board of directors in June of 1912 he was not re-elected as an officer of the company; that after he had been eliminated from plaintiff company he joined his son in a nursery at Stark City, with offices at Neosho, Missouri, which company was named "The William P. Stark Nurseries"; that plaintiff corporation, in order to deprive defendant W. P. Stark of any revenue from his holdings in said corporation, refused

to pay a dividend on its preferred stock, of which defendant W. P. Stark was a large holder; that W. P. Stark sought to enforce the payment of said dividend by instituting receivership suit; **that friction arose between plaintiff company and defendants over the Delicious Apple referred to in the above letter of March 11, 1914**; that plaintiff filed suit against W. P. Stark, and other suits were filed, and that on October 16, 1914, plaintiff and defendant, together with their several attorneys, met in Kansas City, Missouri, and settled their differences through the agreement entered into on said date (Tr. of Rec., pp. 47-50), which contract is referred to in the record as the "Kansas City agreement". This agreement was entered into for the purpose of disposing and settling all the controveries between these parties which had theretofore arisen and which were in existence at that time. It disposed of the receivership suit, the suit for dividends on preferred stock of plaintiff corporation, the Delicious Apple controversy and the other suits which are referred to in the agreement. It will be observed that the date of the "Kansas City agreement" was more than a year after the time alleged in plaintiff's bill of complaint when it "found that sales of fruit trees labeled and marked with the words 'William P. Stark Nurseries' had been made in Missouri, Illinois and **a number of other states**", and more than a year after plaintiff had registered its

trade-mark in dispute, and yet there is this significant fact in this record, that both E. W. Stark, president of plaintiff corporation, and William P. Stark, defendant, testify that nothing was said at the time the "Kansas City agreement" was made about this trade-mark ("Stark Trees") nor any infringement thereof. E. W. Stark testified (Tr. of Rec., p. 56):

> "Q. Mr. Stark, you recall there was nothing said in Kansas City conference about any trade-marks of your company, don't you?
>
> A. There may have been some informal discussion about the Hale trade-mark. I don't know what was discussed between you attorneys, who really fixed up these matters. As far as I recall no trade-mark disputes were discussed except possibly the J. H. Hale."

The J. H. Hale trade-mark belonged to defendants.

W. P. Stark testified (Tr. of Rec., p. 117):

> "Q. Mr. Stark, there has been considerable said here about the Kansas City agreement of October 16, 1914. I will ask you to state in a general way whether anything was said at that conference about any infringement of a trade-mark or unfair competition.
>
> A. There was not.
>
> (After objection by opposing counsel) The Court: I say that he may state whether anything was said either by a representative of Stark Bros., the plaintiff company, or its attorneys.
>
> A. There was no such talk."

In light of this testimony it is perfectly clear that the above letter of March 11, 1914, did not refer to the trade-mark ("Stark Trees") in dispute in this case and that the writer of that letter had no thought of said trade-mark when he wrote it. Petitioner now claims that this letter was notice of the infringement of the trade-mark in dispute and meets the requirement of the Act of Congress concerning notice of infringement of registered trade-mark. It will be observed that this letter was written seven months before the Kansas City contract was made wherein the Delicious Apple is an important and conspicuous item. The closing paragraph of the Act of February 20, 1905, quoted, supra, provides:

> "And in any suit for infringement by a party failing so to give notice of registration, no damages should be recovered except on proof that the defendant was duly notified of infringement **and continued the same after such notice.**"

The record discloses that after petitioner's letter to respondent, August 26, 1916, defendant did discontinue the use of the trade-mark labels except, possibly, in a few cases, where the tags were inadvertently used.

With reference to the use of the name we desire to call attention to the notice added to the decree of the trial court by the United States Court of Ap-

peals, which is set out in full, supra. Shortly after this suit was instituted the defendant issued its fall catalogue, an exhibit in this case, which catalogue contained the following notice under the signature of William P. Stark:

> "We are not connected with nor successors to any nursery. Wiliam P. Stark was one of the original brothers, and officer and director of the Stark Bros. Nurseries & Orchards Company. But he left that company and with his son, William H. Stark, founded the William P. Stark Nurseries at Stark City, Missouri, for the purpose of carrying out a policy that has been most satisfactory and economical to their customers and themselves, particularly in eliminating the expense and unsatisfactory results of selling trees through agents."

The above significant facts clearly justify the statement found in petitioner's brief, "that the decree ordering profits and damages from the beginning of the suit would hardly yield petitioner sufficient money damages to pay for the one-third taxation of cost assessed against petitioner as appellee in the Court of Appeals (Petitioners Brief, p. 32)." From this it is perfectly clear that no criticism attaches to these defendants for any acts committed by them after the institution of this suit, which was the first and only legal notice ever received by respondent.

Petitioner makes further effort to show notice by quoting from the opinion of the trial court, who makes the following observation in his opinion (Tr. of Rec., p. 194):

> "Again, on January 15, 1916, a letter of the same general purport was written by complainant to defendant's known attorneys."

The letter referred to is not in the record, but the answer of the attorney referred to by the Court is found on page 115 of the transcript of the record, as follows:

> "January 31st, 1916.
>
> Stark Bros. Nurseries & Orchards Co.,
> Louisiana, Missouri.
>
> Gentlemen:
>
> I have just returned to the city after an absence of three weeks in Florida and Texas and find yours of the 15th inst. concerning the William P. Stark Nurseries Company.
>
> I have not seen Mr. William P. Stark, or any member of his company for several months. Your letter does not specify your complaint. I do not know what methods you term 'unfair', nor the statements which you construe as 'misleading and untrue'. Therefore, I am not in a position to make a definite reply to your letter, nor am I in a position to advise with the William P. Stark Nurseries Company concerning the matter, even though they should ask my advice in the premises.

I had hoped that there would be no further friction between the companies, and very much regret that you have occasion to make complaint. Very truly yours,

(Signed) Xenophon P. Wilfley."

Enclosure
XPW-AD.

Again, there is no reference to any trade-mark. How could a letter be notice of an infringement of a definite trade-mark registered on a fixed date, when said letter doesn't refer to the trade-mark?

W. P. Stark testified he never received any notice of claim of trade-mark infringement prior to the receipt of the letter from petitioner's attorney a few days before the suit was filed on September 11, 1916, all of which goes to show that this suit was an afterthought, and prompted by jealousy rather than a purpose to redress a wrong.

This being a suit between citizens of the same state, jurisdiction of the Federal Court was acquired by reason of a registered trade-mark under an act of Congress. The bill of complaint prayed injunction restraining the defendants from infringing said trade-mark and trade-mark rights, for an accounting for profits, a decree dissolving defendant William P. Stark Nurseries, and for general relief. A large part of the record is taken up with the question of the trade-mark and the infringement thereof, and while

there is no prayer in the bill of complaint (other than the general prayer for relief) concerning the question of unfair competition, a considerable portion of the record is taken up with that question. The bill of complaint discloses that the wrongful acts charged in connection with unfair competition were all prior to the registration of the trade-mark in controversy, which is dated June 24, 1913, and, therefore, could not be considered as "inseparably" connected with it. As stated in the case of Jacoway v. Young, 228 Fed. 633, it is necessary that the acts of unfair competition be "done in connection with the infringement which augment and aggravate the wrong".

This Court, in the case of Leschen Rope Co. v. Broderick & Bascom Rope Co., 201 U. S. 166, said:

> "As both parties are citizens of the State of Missouri, the jurisdiction of the Circuit Court can only be sustained upon the theory that the case is one arising under the Constitution and laws of the United States. * * * Nor can we assume jurisdiction of this case as one wherein the defendant had made use of plaintiff's device for the purpose of defrauding the plaintiff and palming off its goods upon the public as of the plaintiff's manufacture. Our jurisdiction depends solely upon the question whether plaintiff has a registered trade-mark, valid under the act of Congress."

In the case of Planten v. Gedney, 224 Fed. 382, the trade-mark was sustained, but as to the question of unfair competition the Court said:

> "The complaint includes a charge of unfair competition. Since the parties are not citizens of different states that part of the bill was correctly dismissed without prejudice."

Petitioner can only hope for a Federal Court to adjudge an accounting for gains and profits in acts of unfair competition when said acts are "done in connection with the infringement which augment and aggravate the wrong". The Federal Court could have no jurisdiction of any acts of any of the parties to the suit which were committed prior to the time that the trade-mark infringement became unlawful. If acts which are alleged to constitute an infringement of a trade-mark are separate and independent of other acts which are alleged to construe unfair competition, a Federal Court cannot take jurisdiction of acts amounting to unfair competition simply because it has jurisdiction of other separate and distinct actions amounting to infringement of a trade-mark (Ross v. Geer, 188 Fed. 731; Wood's Sons Co. v. Valley Iron Works, 166 Fed. 770; Leschen Rope Co. v. Broderick & Bascom Rope Co., 201 U. S. 166; Planten v. Gedney, 224 Fed. 382).

In the case of Ross v. Geer, 188 Fed. 733-4, the Court said:

> "If an act constituting an infringement of a trade-mark and other acts constitute unfair competition in trade are separate and independent acts, even though they all relate to the same article of manufacture, each set of acts constitutes a separate and distinct cause of action, of one of which this Court has jurisdiction, and of the other of which it has no jurisdiction."

The trial court limited the complainant to damages on account of trade-mark infringement of the period beginning with the date of the formal notice, to wit, August 26, 1916. This notice was not given by plaintiff company, but by a lawyer who was not an officer of complainant company, and who defendants had never known as the attorney of the complainant company. Therefore, the United States Court of Appeals limited the complainant to damages for infringement of trade-mark as of the date of the filing of this suit, which was a few days later, to wit, September 11, 1916—practically the same time as that fixed by the trial court.

As said by Mr. Justice Van Devanter in Geneva Furniture Co. v. Karpen, 238 U. S. 254, l. c. 259:

> "It hardly needs statement that the jurisdiction as limited, and fixed by Congress cannot be

enlarged or extended by writing in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must, of course, yield to the jurisdictional statute."

Suppose the trial court had found some defect in the registration of the trade-mark in dispute, sufficient to invalidate it as a registered trade-mark, would anyone contend that a Federal court would have jurisdiction between these parties who are citizens of the same state? To entitle plaintiff to Federal jurisdicton the alleged unfair competition must be a part of the trade-mark infringement or an aggravation of same. In other words, there must first be a violation of an Act of Congress, and a liability thereunder. No violation of an Act of Congress can be asserted in this case **until plaintiff has complied** with said Act of Congress, prescribing the conditions upon which relief shall be granted. The registration of the trade-mark doesn't give plaintiff right to Federal jurisdiction to award damages until plaintiffs have complied with the provisions of the statutes with reference to notice.

While the Federal courts, regardless of diversity of citizenship, have jurisdiction of a suit for infringement of a patent or registered trade-mark, such tribu-

nals are without jurisdiction of a suit between citizens of the same state for infringement of an alleged common-law trade-mark and unfair competition. This was decided in the case of Shrauger & Johnson v. Phillip-Bernard Co., 247 Fed. 547, which was a suit for infringing a patent, the infringing of a trade-mark and for unfair competition. The patent was found to be void, the trade-mark not having been registered under the Act of Congress the Court dismissed the bill, and in so doing said:

Foster's Federal Practice Par 3a

> "The defendant renews its motion to dismiss the suit for want of jurisdiction of the court as to plaintiff's claims for infringement of its alleged trade-mark, and for unfair competition in trade. So far as the suit is to recover from the defendant for the alleged infringement of the patent, and to restrain further infringement thereof, it is not denied that so much of the suit as so claims is within the jurisdiction of this court, irrespective of the citizenship of the parties thereto. But so far as it seeks to recover for the alleged infringement of plaintiff's trade-mark, and for unfair competition in trade, it is well settled that the Federal courts have no jurisdiction of such controversies between citizens or corporations of the same state (Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; Wagner v. Searle & Hereth Co., 191 U. S. 195, 24 Sup. Ct. 79, 48 L. Ed. 145; Leschen & Sons Rope Co. v. Broderick & Bascom

> Rope Co., 134 Fed. 571, 67 C. C. A. 418, affirmed 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710; Uagles-Hoggette Mfg. Co. v. Farmers' Hog & Cattle P. Co., 232 Fed. 116, 146 C. C. A. 308."

In Leschen & Sons Rope Co. v. Broderick Co., above, both complainant and defendant were corporations of Missouri engaged in manufacturing and selling wire rope in that state. The complainant had registered a trade-mark under the Act of Congress of March 3, 1881 (21 Stat. 502, c. 138), under which it claimed the right to use said trade-mark as indicative of its manufacture. The appellant, who was the complainant below, filed its bill to restrain the defendant from infringing said trade-mark. The trial court sustained a demurrer to the bill and dismissed the suit. On appeal the Court of Appeals said:

> "Much is said in the brief of appellant to the effect that the defendant has been guilty of unfair competition by palming off on the public rope of its manufacture as complainant's rope. This is a subject, however, over which the Federal courts have no jurisdiction. Complainant and defendant are both citizens of the same state, and for this reason jurisdiction is confined to the trade-mark as registered. If that mark is invalid, the Federal courts are without authority to grant any relief on the ground of unfair trade competition."

The Court found that the trade-mark was invalid, and that the Court rightly dismissed the bill, and its decree was affirmed. In affirming this decree the Supreme Court, in Leschen Rope Co. v. Broderick, 201 U. S. 166, at page 172, 26 Sup. Ct. 425, at page 427 (50 L. Ed. 710), said:

> "Nor can we assume jurisdiction of this case as one wherein the defendant had made use of plaintiff's device for the purpose of defrauding the plaintiff and palming off its goods upon the public as of the plaintiff's manufacture. Our jurisdiction depends solely upon the question whether plaintiff has a registered trade-mark valid under the Act of Congress, and for the reasons above given, we think it has not."

And the decree of the Court was affirmed.

The allegations of the bill with reference to unfair competition started with certain charges with reference to acts of the defendant William P. Stark in November, 1911, and April, 1912; then follow certain allegations with reference to the defendant, William P. Stark, in June, 1912, and allegations with reference to matters connected with the Postal Department in 1912; then follow allegations with reference to the change of the name of the Town of Chester, Missouri, to Stark City, Missouri, which the evidence shows in 1912. After this there are

certain allegations with reference to defendant, William P. Stark, in connection with the 25 years' connection with the plaintiff corporation prior to the registration of the trade-mark. Upon the face of the bill it is clear that the wrongful acts charged in connection with unfair competition were all prior to the registration of the trade-mark, June 24, 1915, and, therefore, could not be considered as inseparably connected with it. The trial court dismisses this question by side-stepping it, and says:

> "Complainant's trade-mark having been found valid, this court has jurisdiction of the parties and of the subject matter for the purpose of enjoining not only the infringing of that trade-mark, but also of wrongful acts in the nature of unfair trade done in connection with the infringement which augment and aggravate the wrong."

But the very essential element of having been "done in connection with the infringement" is wanting in this case. According to the allegations of the bill it was impossible for the acts to have been "done in connection with the infringement", and the evidence does not relieve, but, rather, augments this dilemma of complainant's case.

Furthermore, a Federal Court could not take jurisdiction of acts of unfair trade in connection with an

unregistered or common-law trade-mark, when the parties are citizens of the same state. A federal law cannot be violated by respondent until petitioner had done the things necessary to give him the protection of the law. In this case petitioner failed to do the essential thing of giving notice.

Practically all of the references in petitioner's brief before this court, under the caption "The Evidence", have nothing to do with the issue now before this court, and are designed to mislead rather than enlighten the court on the evidence set forth in the transcript of the record. On page 3, they quote from advertisement in 1910, before there was any friction among the officers of petitioner corporation. On page 4 of petitioner's brief reference is made to happenings in 1880, on page 5 reference is made to the fact that defendant William P. Stark owned 30% of the capital stock of complainant corporation. This certainly has no connection whatever with the proposition of damages or profits either of trade-mark infringement or of unfair competition. Likewise the reference on page 5 to the J. H. Hale peach, as well as the reference on page 7 to the Year Book of 1910, and similar references on page 8 to the Year Book. On page 9 and page 10 of the brief are excerpts from letters written by friends of William P. Stark who were in no wise connected with plaintiff corporation or

defendants, and yet, from a reading of the brief, one would infer that there were statements made by defendant William P. Stark, and likewise as to the reference on page 11 concerning the Delicious Apple. On page 14 of petitioner's brief reference is made to exhibits referred to in the transcript of the record, but reference to the transcript of the record itself shows that none of these exhibits, which consisted of letters purported to have been written by people in various parts of the country, were ever identified. Petitioner seems to have lost sight of the fact that there is but one question before this court, and that is the question as to whether or not the United States Court of Appeals was justified, under the law and the evidence, in modifying the decree of the trial court, fixing the date for the beginning of the accounting as to gains and profits as of the time this suit was filed. The United States Court of Appeals succinctly states the proposition of law upon which it bases its decision and cites authorities supporting it, as follows:

> "As the jurisdiction of the court below depended solely on the fact that there was a federal question by reason of the registration of the trade-mark under the Act of Congress, there being no diversity of citizenship there can be no liability on the charge of unfair competition prior to the notice, under the Trade-Mark Act. To en-

> title one to recover in such a case, the unfair competition must be a part of the same transaction, to wit, a violation of the Act of Congress, and liability thereunder, it must be an aggravation of the infringement of the registered trade-mark to give the court jurisdiction to award damages."

It is admitted that the notice required by the federal statute was not given until the filing of this suit, or possibly a few days before. Therefore, since there could be no infringement of trade-mark prior to that time under the decision of this court and the federal courts throughout the country, the question of an accounting for gains and profits as to unfair competition could not anti-date the notice of the infringement of the trade-mark.

The decision of the Court of Appeals in this case, 257 Fed., l. c. 17, states:

> "Other questions have been discussed by counsel and received our careful consideration, but we do not deem it necessary to pass on them in this cause."

The only other proposition discussed before the Court of Appeals which we desire to call to the attention of this Court is the question of acquiescence or laches on the part of the plaintiff in instituting this suit. This is especially significant on the ques-

tion of accounting. In many cases the courts have denied accounting, although granting an injunction where there has been a delay in instituting the suit.

In the case of Rubber & Celluloid Harness Trimming Co. v. Devoe, Etc., 233 Fed., l. c. 160, the Court found that the plaintiff was entitled to an injunction.

> "But, under the rule enunciated by the Circuit Court of Appeals, of this circuit, in P. E. Sharpless Co. v. Lawrence, 213 Fed. 423, 130 C. C. A. 59, and which I think finds support in the recent opinion of the Supreme Court in Hamilton, Brown Shoe Company v. Wolf Bros. & Co., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629 (Feb. 21, 1916), an accounting was denied."

Bissell Chilled Plow Works v. T. M. Bissell Co., 121 Fed. 257: The Court held in this case that the simple laches in the institution of a suit for unfair competition has by delay of six years, with knowledge of defendant's act, precluded complainant's right to damages for past infringement within the doctrine of the following cases:

> McCain v. Fleming, 96 U. S. 245;
> Menendez v. Holt, 128 U. S. 514.

In the case of Worcester Brewing Company v. Reuter, 157 Fed. 217, there is an injunction, but as to the accounting of the lower court was reversed by reason of the laches of the complainant.

In Leibig Extract of Meat Co. v. Leibig, 180 Fed. 688, an injunction was granted, but in view of complainant's acquiescence of defendant's conduct for six years, an accounting was denied.

In the case of Fahrney & Sons v. Rurimer, 153 Fed. 735, complainant notified defendant to desist from the use of a trade-name which constituted unfair competition, and defendant refused to do this. Complainant waited four years before proceeding legally against defendant. Held, that while complainant was entitled to an injunction, he was not entitled to an accounting.

In the case of McLain v. Fleming, 96 U. S. 245, the Court lays down the rule denying relief of an accounting, which is constantly refused even where the right of the party to an injunction is acknowledged because of infringement where there is acquiescence or laches. In this case the decree for infringement was affirmed, but reversed as to an accounting.

In the case of Menendez v. Holt, 128 U. S. 514, held that the delay in bringing the suit precluded the recovery of damages for prior infringement.

Sebastian's Law of Trade-marks (5th Ed.), 249:

> "As a plaintiff may be disentitled to his injunction by reason of his own laches, so he may be disentitled by the same reason to the account of profits. If he permits the defendant to con-

tinue his infringement for a prolonged period he will not then be allowed to treat him as his salesman and claim an accounting."

Brand v. Turner, 13 L. T. N. S. 746;
Harrison v. Taylor, 11 Jur. N. S. 408;
McLean v. Fleming, 96 U. S. 245.

McLean v. Fleming, 96 U. S. 245, l. c. 251 and 257:

"Unreasonable delay in bringing a suit is always a serious objection to relief in equity; but cases arise in litigations of the kind before the Court where the complainant may be entitled to an injunction to restrain the future use of a trade-mark, even when it becomes the duty of the Court to deny the prayer of the bill of complaint for an account of past gains and profits (Harrison v. Taylor, 11 Jur. N. S. 408). * * * Evidence of a decisive character is exhibited in the record to show that the complainant or his predecessor knew throughout what description of labels and trade-marks the respondent was using; and it does not appear that any of the objections was ever made, except as heretofore stated and explained. Once the respondent was requested to insert the initials of his Christian name before his surname, in the label, and it appears that he immediately complied with the request."

Menendez v. Holt, 128 U. S. 523:

"Counsel in conclusion earnestly contends that whatever rights appellees may have had were lost by laches; and the desire is intimated that we should reconsider McLean v. Fleming, 96 U. S. 245, so far as it was therein stated that even though a complainant were guilty of such delay in seeking relief upon infringement as to preclude him from obtaining an account of gains and profits, yet, if he were otherwise so entitled, an injunction against future infringement might properly be awarded. We see no reason to modify this general proposition, and we do not find in the facts as disclosed by the record before us anything to justify us in treating this case as an exception."

In the case of Wolf Bros. v. Hamilton, Brown Shoe Co., 240 U. S. 251, the accounting was limited from the time of bringing the suit, although plaintiff had notified defendant six years before the suit was brought, by letter, that the defendant was infringing plaintiff's trade-mark, to which letter defendant replied. The Court held, however, that the accounting could not go back of the date of the filing of the suit.

However, aside from the question of laches, we respectfully contend that the decision in this case by the United States Court of Appeals for the Eighth Circuit should not be disturbed by this Court. We submit that it is sustained by the authority of this

Court and other Federal Courts, not only for the reasons assigned in the opinion of the Court, but for equally sound reasons hereinabove set forth, with reference to the laches of complainant in asserting the claim for damages and profits.

Respectfully submitted,

Theophilus P. Wiley

Solicitor for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 171.—October Term, 1920.

Stark Bros. Nurseries and Orchards Company, Petitioner, vs. William P. Stark and William H. Stark, Trustees, doing business under the name and style of William P. Stark Nurseries.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 31, 1921.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought September 11, 1916, in the District Court of the United States by the petitioner, a Missouri corporation, against citizens of Missouri, for an infringement of a trade mark, 'Stark Trees', registered under the Act of Congress of February 20, 1905, c. 592; 33 Stat. 724, and amendments. The District Court found infringement and unfair competition, granted an injunction, and made a decree for an account of profits from March 11, 1914, when the infringement began, limiting the damages, however, to those suffered after August 26, 1916, that being the date when the plaintiff gave the defendant notice of the registration of the mark. The Circuit Court of Appeals concurred with the District Court as to the facts but limited the account as well as the damages to the date when notice was given of the registered mark, a few days before the bringing of this suit. 248 Fed. Rep. 154. 257 Fed. Rep. 9. This limitation is the only question here.

By § 28 of the Trade Mark Act it is made the duty of the registrant to give notice to the public by attaching certain specified words or abbreviations to the trade mark or to the receptacle wherein the article is enclosed; "and in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified

of infringement and continued the same after such notice." 33 Stat. 730. The infringement that is sued for is infringement of a registered trade mark, not infringement of a trade mark. That is the plain meaning of the above words and the necessary scope of this suit since that is the scope of the jurisdiction of the District Court. *A. Leschen & Sons Rope Co.* v. *Broderick & Bascom Rope Co.*, 201 U. S. 166, 172. It seems very plain that the plaintiff had a cause of action outside the statute, but that would have to be asserted elsewhere, as the suit was between citizens of the same State. The statute alone gave the right to come into this Court of the United States. Coming in to assert its statutory rights we will assume in the plaintiff's favor that it could recover for unfair competition that was inseparable from the statutory wrong, but it could not reach back and recover for earlier injuries to rights derived from a different source.

The plaintiff argues that a notice of March 11, 1914, calling on the defendants 'to discontinue the unfair competition and infringement on our rights' coupled with the wilful character of the defendants' wrongdoing ought to lead to a different result, and the District Judge seems to have had a similar notion. But that is to forget the origin and necessary limit of the jurisdiction in this case.

Decree affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.